FEDERAL MANDATORY MINIMUM SENTENCING

HEARING

BEFORE THE

SUBCOMMITTEE ON
CRIME AND CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JULY 28, 1993

Serial No. 96

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FEDERAL MANDATORY MINIMUM SENTENCING

WEDNESDAY, JULY 28, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME AND CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to other business, at 10 a.m., in room 2247, Rayburn House Office Building, Hon. Charles E. Schumer (chairman of the subcommittee), presiding.

Present: Representatives Charles E. Schumer, Don Edwards, John Conyers, Jr., Romano L. Mazzoli, George E. Sangmeister, David Mann, F. James Sensenbrenner, Jr., Lamar S. Smith, Steven Schiff, Jim Ramstad, and George W. Gekas.

Also present: Andrew Fois, counsel; Daniel Cunningham, assistant counsel, David Yassky, assistant counsel; Rachel Jacobson, secretary; Aliza Rieger, secretary; and Lyle Nirenberg, minority counsel.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Mr. SCHUMER. Let me say a few words and then call on my colleagues before we begin the testimony. This is an issue that has become a very prominent one in our Federal criminal justice system. At this hearing I hope to begin—and underline begin—an exploration of whether we should make any changes in the mandatory minimum sentencing that has become more prevalent as a form of sentencing in the last decade.

I think a little history is in order. Before 1984, the vast majority of the public and Members of Congress believed that the Federal criminal justice system wasn't working. First, there were huge disparities in sentencing. People who committed the same Federal crime: one would get 20 years and another would get no jail time at all. That was one reason that there was a push for a change.

But let's not forget the second reason, which I think is very, very important. There were large numbers of people who were committing crimes who did not get much jail time or any jail time at all. The public was outraged. Congress was outraged. I was outraged.

In my judgment, the reason this occurred was not so much the ideology of the judges and the criminal process, but it was that the system was simply overloaded. And year after year, we would try to get money to increase funding so there would be less plea bargaining, less crowding and fewer people falling through the cracks. But no money came. And, as a result, people came up with an idea, create mandatory sentence, to make sure that, if someone is con-

victed of a certain crime, they serve at least a certain amount of time in jail.

In my view, there is not very much support for repeal of mandatory minimums. I don't think there is very much public support for going back to a system where there was no effective minimum, whether it be a minimum mandatory or a sentencing guideline. No one wants to go back to the days when we would read in the newspapers, week after week, that people who had been convicted for significant crimes were getting no or minimal sentences.

In 1984, Congress reinstituted mandatory minimum sentences and set up a Sentencing Commission to establish tough sentencing guidelines. The two came from the same cause and proceeded on the same track. Basically, they were a response to the people's demand that we become tougher on violence and drug crime.

It is now a decade later. When I became chairman of this subcommittee, I began to hear about the unreasonableness, the draconian nature of mandatory minimum sentences, particularly in first offender drug cases. This criticism came from commentators, from relatives of people who were sentenced, and most of all, frankly, it came from the Federal bench and the defense bar. And I began to study the issue.

At first I thought, well, maybe we really have to change things dramatically. I should note here that I am really addressing some of my remarks to those who want change, because I will tell you my odyssey and what happened to me as I explored this issue. The more I explored the issue the less convinced of the need for change I became. But, I have not closed the book. My mind is still open. However, I have become less and less convinced that the problem is severe as the critics say.

When judges and defense lawyers came into my office, I would ask them to give me examples of egregious sentences. My view then was that if the law was resulting in egregious sentences, we would have a hearing, we would expose these egregious cases, and the public and the Congress would see that the law had to be changed. We made a diligent effort—George, if you could come in we could just have the markup and pass Mr. Schiff's bill out, and then I will resume my opening statement. Maybe I will start over.

[Laughter.]

Mr. SENSENBRENNER. I object.

Mr. SCHUMER. OK.

[Whereupon, at 10:07 a.m., the subcommittee proceeded to other business.]

Mr. SCHUMER. My staff—and I want to commend them—diligently reached out to defense lawyers, to judges, and to others, asking them to bring to us the most egregious cases. The cases that really will pluck at people's heartstrings. What we found was that, when it came time for hard facts and examples, there weren't huge numbers of cases. We had to sort of pull teeth to get many of the cases that were truly egregious.

Now there are some egregious cases, and we will hear about those today. I think we should do something about them. But the idea that there are thousands and thousands of people in the Federal system who had a small amount of marijuana in their pocket and were sitting in jail for 5 or 10 years is just not supportable.

Let me tell you the findings. As I said, most cases were not egregious. Several of the cases that were sent to us involved armed drug dealers. Many of the cases involved career criminals with long records of previous convictions. Many of the cases had less to do with mandatory minimums and more to do with complaints of alleged entrapment and charging abuse. Numerous of the cases involved defendants with multiple and continuing sales of drugs.

Here are a few specific examples of the types of cases that were referred to us as egregious cases. These cases were sent to us by reputable people. These were sort of typical. I am not picking out the most extreme.

The defendant in one case, who was described as a nice kid and a churchgoer, was also a paid "protection." He accompanied drug dealers to transactions armed with a semiautomatic assault weapon.

In another case the defendant operated a family business with his brother-in-law who was a chemist. Unfortunately, the family business amounted to a methamphetamine manufacturing and distribution conspiracy. This wasn't the defendant's first offense either; it was his fourth. He was previously busted for marijuana cultivation, been convicted for possession of cocaine, which resulted in a period of unsupervised probation which was revoked due to a previous arrest for methamphetamine possession.

One case involved a marijuana plantation of more than 1,000 plants. The defendants insisted they weren't distributing.

And a final case involved a defendant who made repeated sales of cocaine to undercover agents, including a deal for 2 kilos of cocaine. A search of his apartment uncovered an additional 200 grams of coke. At the time of his arrest the defendant was on probation for the distribution of mushrooms and cocaine.

There are two points I would wish to make here. There may be egregious cases in the State systems. I remember the Rockefeller drug laws in New York State where it was true that somebody who had a small amount of marijuana would languish in jail for what seemed to me to be, on a first nonviolent conviction, too long a period of time.

But the impetus for this hearing has come from members of the Federal bench and the Federal bar who insist that these cases are all over the Federal system. We need more egregious examples, folks, if we are going to have a dramatic change in either eliminating mandatory minimums, which, as you know, I don't support, or even greatly reducing them.

The second point is this: The critics have other complaints about mandatory minimums, aside from the egregiousness of the particular cases. They tell us that mandatories are filling the prisons with mostly first-time nonviolent offenders. I mean the Federal prisons here. Again, the State systems may be different. They tell us that a disproportionate number of young kids are convicted in crack cases. In other words, that there are a disproportionate number of crack cases and these defendants are young kids. They insist that mandatories have a disproportionate impact on minorities, and that our prisons are forced to release violent criminals to make room for the mandatory drug convicts.

Well, the frustrating aspect of these claims is that the only substantiation we receive for them are anecdotes. But anecdotes aren't a good basis for policy. So I have asked the Sentencing Commission, the GAO, the Bureau of Prisons, and others for data on mandatories. Here is what we found out. It is open to rebuttal, but these are the facts from these, in my judgment, rather nonpartisan agencies on this issue.

In 1992, for instance, more than 38,000 people were sentenced under the guidelines. Seventeen thousand of those, it is indeed true, were sentenced for drug offenses. Of that 17,000, 3,189 could be classified as first time, nonviolent drug offenders with no aggravating role in the offense. That is less than 10 percent of all persons sentenced under the guidelines. In other words, we are not filling up the Federal jails with these types of prisoners. And, of the 3,189 cases, only 12.2 percent were convicted for crack. It is not true that most of the cases involve young kids and crack. Seventy-five percent of them were over 25 years of age.

Another claim that has been made is that mandatories have a disproportionate effect on African-Americans. Forty-three percent of these first-time offenders were aliens who had come to America to peddle their drugs.

We learned from the Bureau of Prisons that, while States may be releasing violent criminals to make room for mandatory drug offenders, the Federal prisons are not.

Now, other critics say that the mandatories are incompatible with the sentencing guidelines. I think the two can be made to dovetail with each other quite well. The concepts are not averse to one another.

Some say that mandatories are inconsistently applied. I wonder how, if you compare the amount of inconsistency to the law before there were mandatories to now, what the difference would be. And admittedly, the sentencing guidelines, I think, have done a great deal positively to contribute to avoiding those disparities.

And finally, critics insist that mandatories invidiously discriminate against minorities. But as we will hear this morning, the GAO has done a 3-year study of mandatories. They found that mandatories are generally applied consistently with 85 percent of the offenders convicted of violating mandatory minimum statutes receiving at least the mandatory sentence.

GAO found no evidence of invidious racial discrimination in application of mandatories. And most surprisingly—and listen to this, this has not been stated before but this one knocked my socks off. The GAO found the mandatory minimum sentence to be higher than what the defendant would have received under the sentencing guidelines in only 5 percent of the cases. In 95 percent of the cases that the GAO studied, the amount of prison time that the defendant was actually sentenced to was higher than the mandatory minimum.

Well, where does all this end up? Unless there is overwhelming evidence to the contrary, it seems to me that a repeal of mandatory minimums is not what is called for.

Mandatory minimums probably make sense and have done a job. I think what the facts support, in my judgment, is some kind of

safety valve so that in the truly small number of egregious cases in the Federal system, relief may be granted in an adequate way.

Something should be done about the kinds of cases we are going to hear about today. A safety valve might be able to be invoked by a judge to avoid an unjust sentence. That is all I think at this point the facts support.

Again, however, I want to underline, my mind is open. I have really traveled on this issue quite a bit as I have studied it, and this hearing is not going to be the end of that process. But I thought it was fair and probably helpful in terms of formulating all of our views on this issue that I throw out these facts and give people who disagree a chance to rebut them.

The facts, as I say, support a safety valve. They do not now support a comprehensive repeal or reform of mandatory minimums. And so it is my hope in these hearings we will receive constructive feedback on the safety valve approach, as well as any other approaches that people think are potentially effective.

And with that I yield to the gentleman and apologize for taking longer than usual. I thought it was worth having these facts out on the table. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. Let me say at the outset that I support a continuation of mandatory minimum sentences. Mandatory minimums have been a part of American jurisprudence since 1790 and there has been a mandatory sentence for at least one crime on the book for most of the history of the United States of America.

The mandatory minimums that we are talking about today were enacted about a decade ago in response to either a real or perceived problem where criminal defense lawyers shopped their cases around to judges that they knew were light sentencers, and there was a wide variation of sentences for people who were convicted of identical crimes. So as a response to that, which in my opinion if it did occur was an abuse of judicial discretion, Congress passed both the mandatory minimums as well as the sentencing guidelines.

Significantly, since 1984, 94 percent of the mandatory minimums that have been imposed by the Federal courts have been for violations of just four Federal criminal statutes. First, the statute criminalizing the manufacture and distribution of a controlled substance. Second, the statute relating to possession of a controlled substance. Third, the statute relating to penalties for the import or export of controlled substances. And fourth, the minimum sentence enhancements for carrying a firearm during either a drug crime or a violent crime. Six percent of the mandatory minimums that have been imposed have related to all of the other convictions of the 60 statutes containing mandatory minimum penalties.

So essentially what we are talking about here today is lightening the penalties for those four crimes that I have just outlined because that is where most of the mandatory minimum sentences are being imposed. And in good conscience representing over a half million people in southeastern Wisconsin I can't go along with reducing the sentences for any one of these four crimes that have been outlined because they are crimes that go at the very fabric of society: the

manufacture and distribution of drugs, the carrying of a firearm during a drug crime or a violent crime.

It seems to me that if someone is convicted of a crime like that they ought to go to jail for sure, and that is why I think the present mandatory minimum sentence system is one that serves the public as best we can.

Now, of course, the best type of anticrime program is a crime prevention program, and we will be talking about that in this committee and in Congress later on this year in the context of the crime bills that will be submitted shortly by the administration. But it seems to me that no matter how good a crime prevention program Congress passes there it will not be 100 percent effective. There will be those that decide to lead a life of crime and those that decide to commit crime and those that will be convicted of those crimes by a jury of their peers. And there I think that the public is crying out that for these types of crimes prison is the place for these folks. They ought to be removed from society for at least a period of time, and removing them from society would act as deterrence to others that might be considering conducting themselves in the same manner.

Thank you.

Mr. SCHUMER. Thank you, Mr. Sensenbrenner. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman. I appreciate the chance to join in briefly in the comments. And let me just salute you on a powerful and a very telling opening statement. That was remarkable both for its breadth and for its insight and for its candor. And in this Congress of ours it is very difficult to be able to put all those together. I think the gentleman said that he had traveled a lot on this issue, and I think that that reflects intellectual honesty because this is an easy issue not to travel on.

I haven't had a need to travel very far because I have always felt that mandatory minimums were a way to go, and I would never support any wholesale change, and I am happy that at best we would make discrete changes or some fine tuning of it, but not to abandon it.

And I remember, Mr. Chairman, some years ago, not in this room but in another hearing of another committee, and there was a group of witnesses, professionals, out there just crying and weeping and gnashing their teeth about how terrible the situation was. Our jails are so overcrowded. What a terrible, tormenting thing that was and what an abject failure it was. And I just couldn't restrain myself. I said I think that may be the sign of success of the system, not of its failure. I think the success of the system today is that people are being put away.

And, Mr. Chairman, with your permission, I would like included in the record an article—well, a column which appeared in the National Journal in—earlier this month, as a matter of fact.

Mr. SCHUMER. Without objection.

[This article follows:]

CRIME, PUNISHMENT . . . AND THEN WHAT?

Richard A. Bloom

Attorney General Janet Reno has made her position on crime perfectly clear. "We cannot respond to violence with demagogic promises to build more jails and put all the criminals away," she told Justice Department employees at their first meeting with their new boss. Since making that speech, Reno has asked for a review of federal laws imposing mandatory minimum sentences for more than 100 crimes—mostly gun and drug-related offenses.

Reno is no softie on crime. Her program has a simple theme, presumably supported by most people: Arrest the bad guys who hurt people. Put them in prison. Keep the thugs there for a long, long time.

OK, but what's the best way to accomplish that? It's a question that has kept criminal justice experts flush with federal grants for years. During the past 12 years of Republican Administrations, the government spent billions building prisons and locked away as many people as possible. But Reno argues that prisons are jammed with the wrong people.

In New York, two senior federal judges have refused to hear drug cases because they object to laws forcing them to send first-time offenders to jail. Horror stories abound. A California marijuana farmer gets a mandatory life sentence in federal prison although he has no previous criminal record. The latest batch of statistics from the Bureau of Justice Statistics in Reno's department reveals that almost a third of the people sent to prison in 1990 were drug offenders, up from 11.5 per cent in 1977.

But those figures tell only part of the story. The explosion in the prison population predated the increase in drug-related crime. Tougher gun control laws, a crackdown on white-collar crime and a surge in charges for driving while intoxicated fueled a decade of growth in state and federal prison populations.

Criminal defendants are much likelier to serve time behind bars than they used to be. From 1973-89, arrests climbed 76.3 per cent, but the number of people sentenced to prison soared 221 per cent, according to a study released this month by the U.S. Advisory Commission on Intergovernmental Relations (ACIR). A higher rate of prosecution for people arrested, as well as longer sentences for those convicted, accounted for almost two-thirds of the increase in the prison population during the past two decades, the study said.

Although drug prosecutions have swelled the prison population, drug offenders are a relatively small percentage of inmates. In fact, according to the Bureau of Justice Statistics publication *Prisons and Prisoners in the United States*, most people in state prisons in 1991 were exactly the sort of dangerous felons that most people want incarcerated. Only 7 per cent were nonviolent, first-time offenders and only a fourth of them were convicted of drug offenses. Meanwhile, 60 per cent were serving or had served time for violent crimes. Another 33 per cent were perpetrators of nonviolent crimes but had been behind bars before—and half of this group was in prison for at least the fourth time.

Washington lawyer Paul J. McNulty, a Justice official in the Bush Administration who is now the executive director of an anti-crime group, the First Freedom Coalition, contends that federal prisoners are even more violent than most state inmates are. The number of nonviolent prisoners that could safely be released is minuscule, he said. "Janet Reno describes a mythical prisoner." Even nonviolent drug offenders are participants in an activity that has made some cities a war zone, McNulty added.

Vivian E. Watts, author of the ACIR study, cautioned in an interview that it is not realistic to expect that large numbers of inmates can be released. But even a 10 per cent reduction would let states save money by closing some facilities, she said.

Even if Reno is misguided in her criticism of mandatory minimum sentences, the Republicans didn't succeed in quelling public concern over violent crime either.

And crime fighters in both Administrations have largely ignored a key part of the criminal justice system that might help address the problem of repeat offenders. Parole and probation programs have not shared in the windfall of tax dollars that the rest of the system has received. The ACIR study noted that the number of parole and probation personnel has increased only half as much as has the number of people they must oversee. With little supervision, a huge number of convicted felons, many with drug problems left untreated during their incarceration, end up in prison. The number of people locked up each year after violating their parole or probation has soared 691 per cent since 1974.

Criminal justice experts say that the parole and probation system does not allow close enough scrutiny of criminals and does not offer enough services that might prevent them from getting into trouble again.

Tougher supervision of parolees and probationers, combined with relatively inexpensive drug treatment programs in prisons, could reduce crime. Convicted felons typically meet with their parole and probation officers once a month or less, leaving ample time for straying. What they need is the intimidation factor, said Mark A.R. Kleiman, a drug policy expert at Harvard University. At a recent Urban Institute conference, Kleiman said the system needs to offer swift automatic punishment. Although criminals know that they will have to go to prison if they are caught violating their probation or parole, they're supervised so loosely that they're tempted to take the risk, he said. "That's no way to train a puppy."

Kleiman, usually a pessimist when it comes to drugs and crime, estimated that twice-a-week drug testing for parolees and probationers, combined with short jail terms for those who flunk the test, would cost $2,500 per person a year, or $5 billion annually. But the result would be drastic reduction in cocaine and heroin consumption, plus much lower prison costs. Best of all, Kleiman said, the program could reduce drug sales and the attendant violence. Even hard-liners and softies might agree on this solution. ■

Mr. MAZZOLI. And it deals with some of the statistics, indicating that even at the State level the people who are primarily in the State prisons are violent offenders. You do not have this category of people who are being exploited and beat over by the system and worked over by prosecutors trying to cop pleas and everything else, but, in fact, these are the people that my constituents and my family want out of circulation.

And I thought that the data which the chairman talks about, the 38,000 incarcerated people and the 17,000 drug offenders, only 3,189 of them were for those apocryphal nonviolent people that get wrapped up in the system and have the key thrown away on them.

So, let me just conclude, Mr. Chairman, by saying that I think it is very important to have these hearings. I think we need to get data on the record. And I remember just in the gentleman's hearing just a few days ago I asked a question, and it was unable to be answered by the panel, just exactly where are the data? What are the numbers? Who are these people? And our witnesses were unable to give those numbers.

So a lot of this I think again is apocryphal. It has just been sort of constructed. And I think it is important to get the absolute numbers and to make sure that if there are those few people, and I think there will be very, very few, who somehow are not appropriately in Federal penitentiaries or in local prisons then try to have them somehow released or have other kinds of alternative programs.

But I think it would be folly on our part to somehow make wholesale changes in a law which has in fact disabled people from hurting us, which has in fact put people on ice where they belong to be, sometimes for the remainder of their natural life so that they don't maraud and they don't rape and pillage through our streets.

So, Mr. Chairman, I congratulate you for having these hearings. They are very timely, and I look forward to working with you on fashioning that kind of a finely tuned bill which may make certain changes, but not the wholesale changes which have been recommended.

Mr. SCHUMER. I thank the gentleman. Mr. Ramstad.

Mr. RAMSTAD. Well, thank you, Mr. Chairman. It has been a long time since I have seen such harmony on this committee, and I too appreciate your holding this oversight hearing on mandatory minimums. I have been a long-time advocate of properly targeted mandatory minimums going back to my days in the Minnesota State Senate where I worked to pass mandatory minimums for violent career criminals, including repeat sexual offenders and drug kingpins with repeat trafficking offenses.

Given that approximately 6 percent of criminals arrested commit up to 70 percent of today's serious violent crimes, it is vital that we get career criminals off the streets and the revolving door prison system, and lower the rate of recidivism. Mandatory minimums, as has been said today, are an expression of the public's growing frustration with inadequate crime control and a desire to send a message that repeat violent criminal behavior will not be tolerated by society.

As I said to a group of Boys' Nation delegates last night—future leaders of our country, 17-year-old high school juniors from each

State in the Nation here in Washington to learn more about government, prepare themselves to be future Presidents—our current President was once a Boys' Nation delegate—as I told them, probably the most serious question they will face is the crime problem. That no civilized society in the history of mankind has ever tolerated a woman being raped on the average of every 4 minutes. That our society cannot continue to exist as we know it if violent crime continues to be out of control and if we don't do something about it.

And obviously, we need a broader approach to the crime problem than just mandatory minimums and incarceration. We also need more emphasis on prevention, drug treatment, and education, as I think everyone understands.

So at the outset of this hearing, Mr. Chairman, with all due respect to our colleague from California, Mr. Edwards, I do not believe his bill which abolishes all mandatory minimums is the correct path for us to follow. However, I do share the strong concerns expressed by law enforcement officials like Attorney General Reno about prison overcrowding. But the solution, in my judgment, is not to let violent criminals go free to prey on more innocent victims.

Like Attorney General Reno, I am interested in exploring alternative sentencing proposals for nonviolent first-time drug offenders such as broader application of boot camps and other alternatives.

Therefore, Mr. Chairman, I look forward to the testimony of our distinguished panels today and appreciate your calling this hearing. I trust that we will emphasize targeting mandatory minimums effectively.

Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you, Mr. Ramstad. Mr. Sangmeister.

Mr. SANGMEISTER. Well, thank you, Mr. Chairman. I, too, appreciate your calling this hearing. Although, after I hear all of the opening statements here, including your own, I am not quite so sure that this panel is going to be that open-minded.

As a former prosecutor, I think mandatory minimums are necessary and would certainly support them. I did when I was in the Illinois Senate. I can remember when we passed a bill in the early 1980's, where first-time burglary was a mandatory 2 years. Since then, we have seen a lot of cases come through the system. For example, some 17- or 18-year-old person might get drunk and break into a house or some business. He or she might have no prior record at all, not even a traffic ticket, and yet there was no discretion. If you committed a burglary, and were charged with that crime, the sentence had to be the minimum 2 years.

Among us in the senate, we would talk about that bill as the years went by. We would say: "Gee, did we really do the right thing when we did that?" But I will tell you one thing, from a political standpoint, there is no way you will ever change that. They have tried in Illinois to offer bills to change that, but politically you can't. The people out there that we represent—and I don't blame them at all—have the mentality that we should lock them up and send them away forever. That is the attitude we have out there. I think, as representatives of the people, we have to respond to that.

So, it may be beneficial that you are having this hearing. However, I understand it, we are hearing this on the basis of Mr. Edward's bill. Is that the reason that we are having this hearing?

Mr. SCHUMER. No. Mr. Edwards' bill is one which abolishes the mandatory minimums. I think we should explore the whole issue, not just say whether they should be abolished or kept exactly where they are now.

Mr. SANGMEISTER. Well, you certainly have the people here to do that. You have a distinguished panel.

My observations are, however, that we are not going anywhere with this, but we ought to have the facts out on the table.

Mr. SCHUMER. Thank you, Mr. Sangmeister. Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. Mr. Chairman, I was a career criminal prosecutor before being elected to Congress, and I also did 2 years of criminal defense work. And, as a result of all those years, I am in full agreement with the movement that produced something like sentencing guidelines. In my judgment, criminal sentencing was totally arbitrary in the courts. By that I am not accusing individual judges of being arbitrary, but without any kind of basis to act upon, the sentence for the same criminals convicted of the same crimes with the same background would be widely different depending upon how an individual judge felt that serious that crime was. A judge who felt that one crime is serious would give the maximum, another judge who felt that same crime—excuse me—was not serious would give probation.

And it seems to me that the courts should have some kind of collective social framework upon which to impose sentences. So I am very strongly a proponent of sentencing guidelines.

Now, I also have supported mandatory minimum sentences. However, I have noted as you have the objections that have been stated to mandatory minimum sentences, particularly the objection that they themselves create disparity in sentencing. I mean the argument for sentencing guidelines—we want to have sentences more cohesive. The argument is that mandatory minimums can do the opposite. For example, a high ranking person in drug trafficking and a, comparatively speaking, low ranking person in the same drug trafficking enterprise can receive the identical sentence when some degree of fairness suggests that, one, that the high ranking person receive a heavier sentence than the person who is lower ranking.

And I think because of these objections you are entirely correct to hold this hearing today, so that we can explore the objections. We can explore what alternatives may exist to decide what changes, if any, we think should be made.

But I would conclude by stating that I am willing to look at mandatory minimum sentencing from the point of view for the offenses we are talking about as to whether there should be some adjustment in the amount of required prison time. That is, some individuals in drug trafficking, perhaps, should have a minimum prison time different than others.

But I think there are others in our body who wish to introduce legislation that would allow probation, nonprison, for some of these offenses for which prison is mandatory. I don't agree with that at all. In fact, I don't believe that we should use the words nonviolent

in the same phrase in which we are referring to anyone who is involved in drug trafficking.

Drug trafficking is a very violent enterprise, and anyone who voluntarily participates in that enterprise is no more nonviolent than the individual who drives the getaway car from the scene of an armed robbery. That individual may not personally carry a firearm but that individual is voluntarily participating in a violent enterprise where people are killed every day.

So although I think you are correct that we should inspect the law and we should analyze it, if it needs any changes I think the debate, if any, should be over how long individuals should be in prison compared to others. The debate should never become whether individuals should spend time in prison.

Thank you, Mr. Chairman. I yield back.

Mr. SCHUMER. Mr. Mann.

Mr. MANN. I have no opening statement, Mr. Chairman.

Mr. SCHUMER. Mr. Gekas.

Mr. GEKAS. I thank the Chair. I, too, go on the side of the draconian approach with respect to mandatory sentencing and feel that they have a rightful place in our judicial system. I would yearn for the day, as all of us would, that we would need them no longer. But for the time being they are a necessary part of our societal structure.

I remember when I was in the Pennsylvania Senate we had crafted two very tough minimum mandatory sentences for felons using guns and for repeats, career criminals, and we were very proud of our work. and I presented them in a package to the then Governor, the later Attorney General of the United States, Dick Thornburgh, and asked him to support these mandatory sentences. He told me that he could not support them.

Here was a tough prosecutor from the Western District of Pennsylvania and whose prosecutorial bent was well known to everyone in the world who opposed them. Why? He said I cannot support those unless we accompany them with additional prison space. And he insisted, and we acquiesced, that we would run together on a double track mandatory sentences with the additional space in the Commonwealth to take care of what—the expected prison load that that would create.

My point in stating this to you is this. That I will not very easily succumb to the entreaties of the Attorney General or anyone else, our present Attorney General, that because our prison situation is so critical that we ought to by bits and pieces begin to abandon our mandatory sentencing structure. Rather we ought to be seeing what the Sentencing Commission can do within the system, and where and if necessary to go on the line as I did then and will do again to accord our society additional prison space to get these people out of the way, if that is going to be the result of our continued effort to fight crime.

I also want to state that the Sentencing Commission, as I recall, was formed substantially because we wanted to eliminate disparity in sentencing, as Mr. Schiff has already articulated. And we abandoned parole for the same reason. I worry about the reintroduction of these concepts in the work of this subcommittee or the Congress

generally if indeed we are going to look at this whole situation carefully.

Yet, on the other hand, I look at the Sentencing Commission as my personal and our congressional consultants in this whole range of problems, and I am looking forward to their testimony to determine possibly a course of action to meet some of these concerns.

I thank the Chair.

Mr. SCHUMER. Thank you, Mr. Gekas. Mr. Edwards has waived his opening.

OK. Let's call the first panel forward. They are Ms. La Rotonda, Ms. Richardson, and Ms. Stewart.

Ms. La Rotonda wasn't here when we began the hearing. Is she here now? Please come forward, Ms. La Rotonda.

Our first panel consists of three people whose lives have been affected by the mandatory minimum sentence. As I mentioned in my opening statement, these are among the most egregious cases that came before us, cases that a safety valve might be aimed at. I appreciate you being here.

Ms. Joanne La Rotonda's son was convicted of participation in a large drug deal. He is currently serving a mandatory 10-year sentence.

Ms. Nicole Richardson is herself a prisoner, currently serving a mandatory minimum sentence at Alderson Federal Prison.

And Ms. Julie Stewart is president and founder of Families Against Mandatory Minimums, a national organization of 17,000 citizens working to repeal mandatory sentencing. Ms. Stewart founded the organization in March 1991 after her brother was sentenced to 5 years in Federal prison for growing marijuana.

I want to thank each of you for testifying this morning. Your prepared remarks will be read, without objection, into the record in their entirety, and each of you will have 5 minutes for your presentation.

We will start with Ms. La Rotonda. Then Ms. Richardson. Then Ms. Stewart.

Ms. La Rotonda, you may begin.

Ms. LA ROTONDA. That is OK.

STATEMENT OF JOANNE LA ROTONDA, FLUSHING, NY

Ms. LA ROTONDA. Good morning. Before I start, I would like to first thank Congressman Schumer and——

Mr. SCHUMER. Ms. La Rotonda, if you could just pull the microphone a little more closely to you. It is a crowded room today. I want everyone to hear.

Ms. LA ROTONDA. Good morning. Before I start, I would like to first thank Congressman Schumer and Mr. Dan Cunningham. Thank you.

As the sentencing minutes clearly stated, my son was a minimal participant in a large drug deal. Influenced by the promise of $2,000 by a childhood friend, my son went along. Although he knew it was drugs, he did not know the amount, and the amount was never mentioned to him. Also, these meetings were going on months prior to my son being there that night. For that one night my son received 10 years and his so-called friend received 5, for

which he will be released in about 4 months and my son will still have 5½ years to go without parole.

A brief background. Mark's father died in 1984 from an overdose of medicine. He had a muscle disease. Between the pain and depression, he committed suicide. But before he died he made sure to destroy all we had. Besides the clothes and a 12-inch black and white TV, we began to continue with our lives with nothing. Little by little, I was able to start buying furniture, et cetera.

Mark left school to go to work. He wanted to help me. He received his G.E.D. and was accepted into the electricians' union. Mark had excellent reports from his employer and also with the union. One mistake and his whole young life is to be spent incarcerated.

I love my son very much, and because I know that he has been unjustly sentenced, I will continue to fight for his freedom.

From the sentencing minutes—on page 15, line 2, the judge stated, "Now, as far as I am concerned, this defendant really had nothing to do with this crime." How then can someone who is totally involved get 5 years and someone who had nothing to do with it get 10?

Page 24, line 21: "The court's hands are tied. The court believes that the defendant should be sentenced to less than 10 years." Why is the judge there if he cannot sentence a person according to his involvement?

The Government stated, page 8, line 1, "The Government does not object to Mr. La Rotonda being deemed a minimal participant." My son made a terrible mistake. He acknowledges this already. But to receive 10 years for a first offense, nonviolent crime, I ask you is this a just sentence? I think not.

It costs an average of $700 per week, with the final cost after 8½ years of $400,000, to keep my son in a camp. This amount does not include seven transfers within 2½ years, which I know is costly also. Every day I read the paper, and occasionally I read how the prisons are overcrowded and violent criminals are being released to make room for nonviolent offenses. What is happening to our justice system? The scales of justice are being tripped in the wrong way. People should be punished, but let the punishment fit the crime.

Last, but by far not least, if changes are to be made in whatever form, reform must be retroactive, or thousands of people, like my son, will be lost forever. I urge you as Members of Congress to repeal mandatory minimum sentences.

Sincerely I thank you for the opportunity to speak here today.

Mr. SCHUMER. Thank you, Ms. La Rotonda.

Ms. LA ROTONDA. Thank you.

Mr. SCHUMER. Ms. Richardson.

STATEMENT OF NICOLE RICHARDSON, ALDERSON FEDERAL PRISON

Ms. RICHARDSON. My name is Nicole Richardson and I am 21 years old.

Mr. SCHUMER. If you could again, Ms. Richardson. We want to make sure everyone can hear what you have to say.

Ms. RICHARDSON. My name is Nicole Richardson and I am 21 years old. I am a first offender, and I am serving 10 years in prison for a drug conspiracy.

I am in prison because I dated a drug dealer and on a few occasions I was in the car when he would make a transaction. And what mainly is the conspiracy of my charge is a telephone call of someone wanting to know where my boyfriend was and relating to a drug deal.

Mr. SCHUMER. That wasn't because of you, Ms. Richardson.

Ms. RICHARDSON. And everyone got indicted and got charged, and my boyfriend did before me. And I went to trial because I didn't feel that I was guilty because I never bought or sold anything to anybody.

And I was found guilty at my trial. Everyone that was in my case was brought in to testify against me, and because of their testimony they got larger breaks on sentence reductions. Three people are out on the street right now. They found me a minor participant, and they dropped my guidelines 4 points. I still got 10 years. The most that was given in my case was 5 years.

Mr. SCHUMER. Thank you, Ms. Richardson.

Ms. Stewart.

STATEMENT OF JULIE STEWART, PRESIDENT, FAMILIES AGAINST MANDATORY MINIMUMS

Ms. STEWART. Good morning, Chairman Schumer, and thank you for inviting me to be here today.

After listening to your opening statements, I sincerely hope your minds are open, because this is not such a cut and dried problem. And I want to make it clear that we are not talking about either putting people in prison under mandatory sentences for drug offenses or letting them out. That is not the choice here, and I hope that our contributions and the ones you will hear afterwards make that clear.

I don't have any problem with prison. My brother is in prison for 5 years for growing marijuana, and I have no problem with the fact that he went to prison. It has been the best thing that happened to him that he got arrested and that he went to prison. It was the wake-up call that he needed. And I hear this from parents all over the country all the time. But 1 year in prison would have been enough to punish and rehabilitate my brother.

So our objection here is not to say we don't like prison or don't put these drug offenders in prison. The question is, what sentence is appropriate for the crime? And do mandatory minimum sentences let judges take into account the things that are needed to determine what the appropriate sentence is?

I am really speaking here on behalf of FAMM's 17,000 members whose voices are never heard in these chambers, but whose voices need to be heard in this chamber. We want to help the members of this subcommittee understand how these laws are manipulated to maximize the sentence length that a defendant will get.

I am not saying that the intention of Congress was bad in the 1980's when these laws were made. I think that the Members of Congress were responding to a necessary need and I understand where they came from, and the idea of putting drug kingpins and

major drug offenders away is fine. But as you have heard from Nicole's testimony and Joanne's already, we don't always get just the kingpin. And, in fact, mandatory minimum sentences prevent a judge or anyone from being able to determine and discriminate between who is the kingpin, who is the mule, who is the addict, and then determine the appropriate sentence.

Mandatory minimum laws create such a simple black and white sentencing scheme that they cannot really accommodate the very complex circumstances of each case or the motives of each individual, and those are the sorts of factors that we have taken into account for 200 years in this country under the criminal justice system that we have been very proud of.

My brother's case is a perfect example of a typical drug offense that receives a mandatory minimum sentence. He was growing marijuana with three of his friends—two of his friends. The friends were living in the house where the marijuana was growing. When they were arrested they turned my brother in. Both of them had prior felony convictions. In exchange for their testimony, they both got probation. My brother, who was a first offender, got the 5 years without parole. He has done 3 years of his sentence already in prison.

But another aspect of his case is also very important, and this is driven by mandatory minimum sentences. There was no reason his case should have gone into Federal court. He was arrested by local authorities. He never crossed State lines. There was no reason that the Federal Government needed to be involved in his case.

The only reason he is in Federal prison today is because the prosecutors knew that he would get a longer sentence under Federal laws than he would under State laws. Chief Justice Rehnquist recently voiced a similar opinion at the Sentencing Commission conference when he stated that "Federal laws often provide stricter sentences for drug possession and distribution than their State counterparts, so State and Federal prosecutors funnel more and more of their drug cases into Federal courts." Or if you want it in Ross Perot's lingo, that "giant sucking sound" you hear is all of the State drug cases being pulled into the Federal courts because of mandatory minimum sentences.

But where a case ends up is just one of the ways that mandatory minimum sentences manipulate the length of the sentence the defendant will get. There are others; for instance, the schoolyard offense. If you sell drugs within 1,000 feet of a schoolyard. Now that sounds like a very good law. Of course, we want to get people who are selling drugs to children.

But what happens if the undercover agent sets the buy up within 1,000 feet of a schoolyard because he knows it will give you an enhanced sentence? What happens if the school is a mail-order Bible school that is located on the third-floor walk-up between two taverns? Or what happens if you live within 1,000 feet of a schoolyard and you are using the drugs in your own house?

Those are the sorts of things that in practice the laws do affect. I mean when you make these laws here you have one thing in mind. But what happens when they actually get on the street is a very different issue.

Crack cocaine sentences do have many flaws, as Chairman Schumer has already pointed out. I think that the biggest problem is that the sentence for crack cocaine is one hundred times greater than that for powdered cocaine, and that disparity is racist in its application and lends itself to being manipulated by unscrupulous law enforcement officers.

For instance, in New York last year the DEA arranged a cocaine buy from Miguel Rosario. After Miguel delivered the 1 kilo of powdered cocaine to the undercover officers, they said, "Oh, no. We wanted it in crack form." And he said, "Well, I don't know how to make crack cocaine." And they said, "Well, here. We will show you." So they showed him how to make the crack cocaine. He cooked it, and after he cooked it, they arrested him. Now he is sitting in prison for 12 years because of the weight of the crack cocaine. If he had been busted with the 1 kilo of powered cocaine, he would have been doing closer to 5 years.

The crack cocaine law also has some very serious racial overtones, simply because 99 percent of the people who are arrested for crack cocaine are black. It is very troubling that we are sentencing so much more severely, those who use crack cocaine than those who use powdered cocaine. That is not an issue I want to get into in detail today, but I think it is something that this committee should look at much more in depth.

I know that talking about guns is sort of a taboo subject on the Hill, but I am going to mention it simply because I think it is another example of how mandatory minimum sentences manipulate the sentence that the defendant will get—how they are used as a manipulative tool.

The Armed Career Criminal Act requires a 15-year mandatory minimum for felons in possession of a firearm. Again, it sounds like a very good law. We don't want felons out there shooting people—you know, using guns again. But what happens if the gun is not being used in any sort of crime?

For instance, Bill Keagle from Texas, from El Paso, had four prior felony convictions back in 1978 and 1979 when he was 17 years old. In 1990 when he was 30-something he was married and had two children. He took two hunting guns that he had bought from a friend to shoot doves with. He took them to a pawnshop to pawn them because he needed the money. The police in El Paso ran a routine check of the pawnshop transaction and found out that he was a felon who was in possession of these firearms. They turned his case over to BATF and now Bill Keagle is sitting in Federal prison under the Armed Career Criminal Act.

Congressman Schumer has already mentioned cases where the DEA actually asks someone to bring a gun to the drug transaction and then when they bust him, he gets time for the gun as well as time for the drugs. That is how the mandatory minimums are manipulated.

There are lots of extreme cases. I could go on and on. I will give you one more, just to show you the extreme to which these laws are being misapplied.

It is the case of Gary Scott and his brother Wayne. These two brothers were counterfeiting Disney World tickets—and selling them to a supplier. Disney World found out about it and was in-

censed and alerted the law enforcement agencies. The DEA actually found the supplier, which was probably not that hard to do, and they said, "We would like to buy 1,500 tickets from you," and so the supplier said, "Fine."

And he went to the Scott brothers and they did this deal, so the DEA could have arrested them after that transaction for counterfeiting the Disney World tickets. Instead the agents came back to the supplier and said, "Well, now we would like to buy 5,000 Disney World tickets from you, but we don't want to pay cash. We want to pay in cocaine." And the supplier said, "Well, the Scott brothers only want cash. They don't want cocaine. And I don't really know how to turn this cocaine into cash to give to them." And the DEA agent said, "Well, don't worry. If you can't get rid of it we will help you get rid of it."

So, of course, they do this transaction, and the supplier and the two Scott brothers get arrested. Miraculously, the supplier, somehow his case was dropped, although he had three or four prior felony convictions. But the two Scott brothers are now in prison for 10 years each under the cocaine conspiracy mandatory minimum.

If they had been busted after the first transaction that did not involve drugs, they each would have gotten 14 months in prison. There was no need to introduce drugs into that transaction.

So with the exception of the last case I have cited, these are very typical examples of the cases we have—more than 7,000 cases in our office. I know you say you can't find very many good ones. I know I supplied your subcommittee staff with some cases that I thought were very good. The problem is that "good" is very relative.

What I am saying is none of these people are choirboys. My brother broke the law. He deserves to go to prison. I don't have any problem with that. These two both broke the law. They need—there are people who need to go prison.

Nicole may need to go to prison, but the point is for how long? And should Members of Congress be micromanaging the judges so that they have no discretion? Or should Congress allow the judges to use the discretion that is available to them in the guidelines and try to fit an appropriate sentence?

Finally, I don't believe that there is any safety valve that properly addresses the many problems caused by mandatory minimum sentences. I think that they create a systemic problem that infects the entire criminal justice system from the arresting officer to the prosecutor to the defendant, the judge, the court docket, the prison population, and no minor adjustment is going to address all of those inequities.

I do support Congressman Edwards' bill—I am sure that comes as no surprise to most of you here—because I think that if Congress wants to see the punishment be swift and certain and free of horror stories we have to get rid of mandatory minimum sentences. We have to allow the guidelines to work free from the distorting influence of mandatory minimums, and they have never been allowed to do that from their inception. The guidelines have been tinkered with and altered because of mandatory minimum sentences.

But having said that, if I had to accept some kind of safety valve, the only one that I would accept would be for nonviolent first of-

fenders to be completely exempt from any mandatory minimum sentence.

I think that is pretty much all I have to say. I just want to make it clear that we don't oppose prison. We just want the punishment to fit the crime. Thank you for letting me have my say here today.

[The prepared statement of Ms. Stewart follows:]

PREPARED STATEMENT OF JULIE STEWART, PRESIDENT, FAMILIES AGAINST MANDATORY MINIMUMS

Good morning, Chairman Schumer and members of the subcommittee. Thank you for inviting me to speak to you during this oversight hearing on mandatory minimum sentences.

You'll hear from a number of criminal justice experts today, who will argue the pros and cons of mandatory minimum sentences. My role here, as a lay person, is to help you better understand WHO is going to prison under the current mandatory sentencing laws and HOW these laws are manipulated to maximize sentences for minor drug offenders.

My interest in this issue started as a personal one. In February of 1990, my only brother, Jeff, was arrested for growing marijuana with some friends. The marijuana was growing in a house that he owned, but the friends lived in. When Jeff's friends were arrested at the house with the marijuana, they gave the police Jeff's name. As a result of their cooperation, they both received probation, even though both of them had prior felony convictions. My brother, a first offender, received a five year mandatory minimum sentence, without parole. He has now served nearly three years in prison.

When Jeff was arrested and told me what sentence he faced, I was incredulous. It made no sense to me that a nonviolent, first offender would receive five years for his offense. I didn't object to him being punished, or going to prison, but I did object to the length of the sentence. I began to research the laws that required Jeff to sit in prison for five years, and found that they originated from this very subcommittee, during a period of heightened drug hysteria in the mid-1980's.

I believe the intention of the members of Congress was good; to lock up major drug traffickers and kingpins, but the method was wrong. Mandatory minimum sentences don't discriminate between the drug kingpin, the mule, or the addict. Culpability no longer matters. Length of the defendant's involvement in the crime, doesn't matter. There are only two variables that a judge can consider at sentencing—the type of drug and its weight. This simple black and white sentencing scheme cannot accommodate the complex circumstances of each case or the motives of each individual.

I understand how good these sentences sound when you're creating them and voting for them. But what happens to them once they leave Washington? Let me give you some examples of how mandatory minimum laws are applied in the real world.

My brother's case is perfect example of a typical drug offense that receives a five-year mandatory minimum sentence. He was guilty of growing 375 marijuana plants and the estimated weight of those plants, called for a sentence of 5 years. But another aspect of Jeff's case is also typical—that it should never have gone into federal court.

He was arrested by the local police. His crime did not involve interstate traffic. His case is in the federal system only because the prosecutors knew that he would do more time under federal laws, than in the state of Washington. As Chief Justice Rehnquist recently remarked, "federal laws often provide stricter sentences for drug possession and distribution than their state counterparts, [so] state and federal prosecutors funnel more and more of their drug cases into federal courts." Or to put it in Ross Perot's lingo, that "giant sucking sound" you hear are all of the state drug cases being sucked into federal courts by mandatory minimum sentences.

Where a case ends up, is just one of the ways that mandatory minimum sentences are manipulated to effect sentence length. There are many more. The mandatory minimum sentence for selling drugs within 1000 feet of a school sounds like a good law. But what happens if the undercover agents set-up the buy within 1000 feet of a school, or the school happens to be a mail-order bible school located on the third floor of a building between two taverns, or you *live* 999 feet from a school yard? As Jim Miller, Timothy Pharr, Huey Johnson, and others defendants have found out, you still get the enhanced sentence.

The crack cocaine mandatory minimum sentence calls for a sentence 100 times greater than that for powdered cocaine. This provision is also susceptible to manipulation by unscrupulous law enforcement officers bent on maximizing punishment. At

the time the law was passed, crack cocaine was a new problem in our inner cities and policymakers wanted to stop it. However, when DEA agents arrested Miguel Rosa Rio in New York last year, I doubt they were focused on inner city decay. After delivering powder cocaine to undercover DEA agents, Miguel was instructed *by them* to turn it into crack cocaine. They even showed him how to do it, because he didn't know how. After making the powder into crack, he was arrested. He's now serving 12 years in prison.

The crack cocaine law also has serious racial overtones because it is overwhelmingly applied to blacks, who predominantly use crack. I hope this subcommittee will soon, if not now, consider eliminating the disparity in crack and powder cocaine sentences.

I know that talking about mandatory minimum sentences for gun offenses is kind of taboo, but I think it's important for you to know how these mandatory minimums are also applied.

The Armed Career Criminal Act (ACCA), which requires a 15 year mandatory minimum for a felon in possession of a firearm, again sounds good on its face. But ask Bill Keagle from Texas why he's sitting in prison today. He had four prior felonies for unarmed robbery in 1978 & 1979 at age 17. By 1990, he was married with two children to care for. He took two hunting guns (a shot gun and a rifle that he had bought from a friend to shoot doves) to a pawn shop because he needed the money. The El Paso police ran a routine check on the pawn shop transaction and discovered he was a felon. Keagle is now in prison under the Armed Career Criminal Act.

Another Texan, 23-year-old Timothy Evans was encouraged by the DEA who had set up a buy, to bring a gun along for his protection. When he arrived at the prearranged location, the DEA first showed Timothy how to use the chemicals they were selling him to make methamphetamines. After mixing the chemicals, they arrested him. He is now serving five years for the gun and five years for the methamphetamines.

Probably the most bizarre example of the abuse of mandatory minimum sentences is the case of Gary Scott and his brother, Wayne. The Scott brothers were counterfeiting Disney World tickets and selling them to a supplier. Disney World alerted various law enforcement agencies and soon the ticket supplier was found. The undercover DEA agent told the supplier he wanted some tickets but could only pay him in cocaine. The supplier knew that the Scott brothers only wanted cash for the tickets, so he wasn't very interested. He even told the DEA that he didn't know how to convert the cocaine into cash to pay Gary and Wayne, so the DEA agent offered to sell the cocaine for him if he had any trouble getting rid of it. After the transaction, they arrested the supplier and the Scott brothers. Oddly, the DEA dropped charges against the supplier but sentenced the Scott brothers to 10 years each in prison for a cocaine conspiracy. Had they arrested them for merely counterfeiting, the brothers would have done about 14 months each in prison.

With the exception of the last case I've cited, these are very typical examples of the 7,000 cases we have in my office. None of these people are choir boys, and all deserve to be punished for their illegal activities. But for how long, and who should decide? Should Congress micro manage judges, or should they be allowed to use the discretion available to them under the sentencing guidelines?

I don't believe that there is any "safety valve" that can correct the many abuses caused by mandatory minimum sentencing. The problem is a systemic one that infects the entire criminal justice system, from the arresting officer, to the prosecutor, to the defendant, the judge, the court docket, and the prison population. No minor adjustment can adequately address all of these problems.

I fully support Congressman Edwards' bill, the Sentencing Uniformity Act of 1993. If the members of Congress want to see punishment be swift and certain and free of "horror stories," mandatory minimum sentences must be eliminated. We need to allow the sentencing guidelines to work unfettered by the conflicting mission of mandatory minimum sentencing laws. The guidelines are not perfect, but they're the only realistic and effective alternative we have to mandatory minimum sentencing and we need to give them a chance to work.

If I had to accept some kind of "safety valve" short of the abolition of mandatory minimums, the only one I'd accept is one that would exempt nonviolent, first offenders from mandatory minimum sentences. But as I've already made clear, that would serve as only a partial remedy to the many problems inherent in mandatory minimum sentences.

As a final note, I want to stress that I don't oppose prison sentences. What happened to my brother, Jeff, was in some ways the best thing that could have happened—it was the wake up call he needed to get his life on track again. I hear this from parents all over the country. Families Against Mandatory Minimums does not

oppose prison punishments, we simply want the punishment to fit the crime. Thank you.

MANDATORY MINIMUM CASES
from the FAMM Foundation files

Michael Irish is a 44 year-old carpenter from Portland, Oregon, married with two children. He is serving a 12 year sentence for conspiracy to import hashish. First offense.

Michael's role in this crime was to unload hashish from a boat to a truck. He was unaware of the operation until 72 hours before he unloaded the hashish. That's when the captain of the boat asked him if he would like to work for "three hours for as much money as you would earn in a year." Michael's wife had cancer two years earlier and her treatment wiped them out financially. Knowing that his family needed the money, Michael agreed to unload the boat load of hashish. His three hours of work are now costing him 12 years of his life.

Nicole Richardson is a 20 year-old from Mobile, Alabama, serving a 10 year mandatory minimum sentence for an LSD offense. First offense.

Nicole was a senior in highschool when she fell in love with Jeff, a small time dealer at a local bar. When Jeff was arrested , Nichole was charged with conspiracy to distribute LSD. Her crime was telling an informant in a taped phone conversation, where to find her boyfriend to finalize an LSD sale. Because she had no information to trade for a reduction in sentence, she is sitting in prison for ten years. Her boyfriend cooperated with the prosecutor and reduced his sentence to 5 years.

Marvin McCoy is a homeless, drug addict from Portland, Oregon. He is serving a 15 year sentence for aiding and abetting one crack cocaine transaction involving 22 grams. First offense.

Marvin was befriended by a government informant who was paid thousands of dollars to go to Portland and mingle with the black community and portray himself as a drug dealer. He provided Marvin with drinks, drugs, meals, and asked him to introduce him to cocaine sellers. Marvin made some introductions for him and his involvement, though minor, cost him 15 years of his life.

Mark Young is a 42 year-old from Indiana, serving a mandatory minimum sentence of life without parole for his third drug offense.

When Mark was 20 and 22, he was convicted of two minor drug offenses: trying to get a false prescription filled for someone else, and possession of quantities of quaaludes. Twenty years later he was convicted on a marijuana conspiracy. Mark falls into the "three time loser" category and although he is a nonviolent offender, he is now serving his life sentence at the most violent prison in the federal system--Leavenworth.

Patricia Williams is serving a ten year mandatory minimum sentence for possession of 120 grams of heroine. First offense.

Patricia was a heroine addict whose family died 15 years ago leaving her with a sizeable estate. For two years before she was arrested, a paid informant followed her waiting until she bought some heroine. The informant had a written contract guaranteeing her a percentage of assets seized from Patricia's arrest. After her arrest, Patricia was offered a substantially reduced sentence if she would testify against one particular person. She knew the person, but he had not been involved in her drug offense so she refused to testify against him. Patricia asks, "How many cooperators with a better grasp of their own self interest provide the carefully coached and solicited lie? In this way how many barely guilty, or at times innocent, people serve long sentences?" Among the assets seized from Patricia was a fully-occupied apartment building in Manhattan that she had purchased with her inheritance 13 years prior to her arrest and in which she never lived.

O. Maffett Pound is a 52 year old from Mississippi, who is serving a 20 year mandatory minimum sentence under the career criminal enterprise law. First offense.

For 20 years, Maffet owned and ran a lake-side resort in Mississippi, where he lived with his wife and kids. Between 1986 and 1989, he purchased approximately 300 pounds of marijuana for his consumption and to sell to friends. He was arrested after one of his buyers was arrested and turned him in. The buyer had a previous felony record and admitted in court that he had sold drugs for 15 years. In exchange for his testimony, the buyer was given immunity and allowed to keep his assets. Maffet was considered a career criminal because his offense occurred over several years, so he received the mandatory 20 year sentence. Maffet's wife was sentenced to 5 years in prison for knowing about his activities and not turning him in. She did not smoke marijuana.

Keith Edwards is a 20 year old from New York, serving a 10 year mandatory minimum sentence for possession with intent to distribute more than 50 grams of crack cocaine. First offense.

When Keith was 19 years old, he sold crack cocaine to a paid informant. The transaction was observed by numerous law enforcement officials. Instead of arresting Keith after the first buy, they set up four more buys from him, one within 1000 feet of a school. After Keith sold the informant a combined total of more than 50 grams of crack cocaine, he was arrested. The combined weight of 50 grams of crack, forced the judge to give Keith a ten year mandatory minimum sentence.

FAMM FACTS

PRISON OVERCROWDING

• In 1992, America had 1.2 million people behind bars. The United States imprisons more of its citizens per capita than any other country in the world. Per 100,000 people, the United States imprisons 455, with South Africa in second place with 311. In other words, one in every 300 Americans is in prison--not jail, probation, or parole--but in prison. *(The Sentencing Project, Americans Behind Bars: One Year Later, 1992)*

• From 1980 to January 1993, the federal prison population grew by 57,000 inmates--from 24,000 to 81,000. At the current rate of incarceration, by 1995 the federal prison population will reach 100,470, and by the year 2000 there will be 136,980 people in federal prisons. *(Bureau of Justice Statistics, Sourcebook 1991, p. 679)*

• Convictions for federal drug offenses increased 213 percent between 1980 and 1990. *(Bureau of Justice Statistics, National Update, January 1992, p.6)*

• Drug offenders currently make up 57 percent of the federal inmate population, up from 22 percent in 1980. By 1995, nearly 70 percent of federal inmates will be drug offenders. *(Testimony by former BOP director, J. Michael Quinlan, given on February 20, 1992 to House Appropriations Subcommittee)*

• In 1990, more than half of the federal inmates serving mandatory minimum sentences were first offenders. *(Bureau of Justice Statistics, Sourcebook 1991, p.542)*

• Average federal sentences in 1990 for the following offenses were:
Drugs offenses: 6.5 years. Sex offenses: 5.8 years. Manslaughter: 3.6 years. Assault: 3.2 years. *(Bureau of Justice Statistics, Sourcebook 1991, p.532)*

EXCESSIVE TAXPAYER COSTS

• The average cost of incarcerating a federal prisoner is $20,072 per year, or approximately $55 per day. *(Bureau of Prisons, State of the Bureau 1991, Summer 1992)*

• To house, feed, clothe, and guard the 81,000 federal inmates, taxpayers pay a hefty $4.5 million per day or $1.6 billion per year.

• At the state level, taxpayers cover incarceration costs as high as $6.8 million per day in California where over 100,000 people are behind bars at an average of $25,000 per inmate per year. *(The California Republic, July 1991, p.9)*

• States spend more of their budgets on justice programs (6.4%) than on housing and the environment (3.8%) and nearly as much as they spend on hospitals and health care (8.9%) *(Bureau of Justice Statistics, Justice Expenditures & Employment, 1990, Sept. 1992)*

• The federal drug program budget for FY 1993 was $12 billion. *(Office of National Drug Control Policy)*

• Federal spending for corrections increased 44 percent between 1989 and 1992, from $1.5 billion to 2.2 billion per year. *(U.S. Budget FY 93, Part 1, p.198)*

• The Bureau of Prisons' authorized budgets increased 1,350 percent between 1982 and FY 1993, from $97.9 million to $1.42 billion per year. *(National Drug Control Strategy Budget Summary, 1992, p.212)*

• It costs more to send a person to federal prison for four years than it does to send him to a private university (tuition, fees, room, board, books & supplies) for four years. *(Sources: Federal Bureau of Prisons, The College Board)*

• Figures are not yet available for the tax revenue loss from former tax-paying inmates, or the increased cost of social services needed by inmates' families that were previously supported by the inmate.

PRISON CYCLE

Statistics show that people who have been in prison are more likely to have children who will end up in prison. Long mandatory prison sentences are sowing the seeds for the next generation of inmates.

* More than half of the juveniles in state and local jails have an immediate family member who is a felon.

* More than one-third of the adults in state prisons and local jails have an immediate family member who is a felon.

* Relative to the general population, inmates are more than twice as likely to grow up in a single parent family. Seventy percent of juvenile offenders and 52 percent of adult offenders had one, or no, parent.

(Sources: Bureau of Justice Statistics, Survey of Youth in Custody 1987, Profile of Jail Inmates 1989, Survey of Inmates in State Correctional Facilities 1986)

PUBLIC ATTITUDES

* toward crime: 61% prefer attacking social problems, 32% want more prisons & law enforcement.

* toward purpose of prison: 48% think it should rehabilitate, 38% think it should punish.

* toward spending more money & effort in fight against illegal drugs: 40% prefer teaching the young, 28% work with foreign governments, 19% arrest sellers, 4% help overcome addiction, 4% arrest users.

(Source: Bureau of Justice Statistics Sourcebook 1991, pp.202, 210, 243)

U.S. SENTENCING COMMISSION FINDINGS ON MANDATORY MINIMUMS

* Sentencing power has been transferred from the courts to the prosecutors. The Commission reports that, "Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised."

* Mandatory minimum sentences create disparities based on race. Blacks and Hispanics are charged with and receive mandatory minimum sentences more often than whites. The Sentencing Commission reports that this racial disparity "reflects the very kind of disparity and discrimination that the Sentencing Reform Act...was designed to reduce." For defendants arrested for similiar crimes, Blacks receive mandatory minimum sentences 68 percent of the time; Hispanics 57 percent of the time; and Whites, 54 percent of the time.

Crack cocaine sentences also cause race-based disparities. These sentences are 100 times greater than those for powder cocaine. Possession of 5.01 grams of crack, results in a five year sentence. It takes 500 grams of powder cocaine to get a five year sentence. In 1992, 92.6 percent of all defendants sentenced for federal crack cocaine offenses were Black. All of the defendants sentenced for possession of crack were Black.

* Mandatory minimums are ineffective--low level participants receive mandatory minimums more often than top level kingpins. Street-level participants receive mandatory minimums 70 percent of the time; mid-level 62 percent of the time; and top-level importers, 60 percent of the time.

* Mandatory minimums create "cliffs" in sentencing based on small differences in weight. Possession of 5.0 grams of cocaine requires a sentence of up to one year, but possession of 5.01 grams of cocaine requires a sentence of atleast five years.

(Sources: U.S. Sentencing Commission Report to Congress on Mandatory Minimum Sentences, August 1991, and U.S. Sentencing Commission Monitoring Data Files, April 1 - July 1992.)

5

COMPARATIVE OFFENSES

Keep in mind: Federal guidelines equate one marijuana plant to one kilo (2.2 pounds) of marijuana, regardless of the size of the plant at arrest. In LSD cases, the guidelines include the weight of the paper, or the sugarcube, or the orange juice in which the LSD is mixed, to determine the total drug weight on which sentencing is based.

Level 24: 4.3 years to 5.3 years

$80 million worth of larceny, embezzlement, other forms of theft. Kidnapping abduction, unlawful restraint.
176 pounds of marijuana, 800 mg. of LSD, 400 grams (less than 1 lb.) of cocaine powder.

Level 26: 5.3 years to 6.6 years

Robbery with life-threatening injury.
220 pounds of marijuana, 1 gram (half the weight of one dime) of LSD, 500 grams (a little over 1 lb.) of cocaine.

Level 28: 6.6 years to a 8.1 years

Conspiracy or solicitation of murder.
880 pounds of marijuana, 4 grams (almost the weight of 2 dimes) of LSD, 8.7 pounds of cocaine powder.

Level 30: 8.1 years to 10.1 years

Kidnapping, abduction, unlawful restraint with ransom demand.
1540 pounds of marijuana, 7 grams (a little over 3 dimes weight) of LSD, 8.7 pounds of cocaine powder.

Level 38: 19.6 years to 24.4 years

Selling or buying of children for use in the production of pornography.
66,000 pounds of marijuana, 300 grams (approx. 3/4 lb.) of LSD, 330 pounds of cocaine powder.

(Source: U.S. Sentencing Commission Guidelines Manual, November 1, 1992)

SOME ORGANIZATIONS THAT OPPOSE MANDATORY MINIMUM SENTENCES

- The United States Sentencing Commission
- The Federal Courts Study Committee
- The American Bar Association
- Each of the 11 Judicial Conferences of Federal Judges
- The National Association of Criminal Defense Lawyers
- The American Civil Liberties Union

Mr. SCHUMER. OK. Thank you, Ms. Stewart. And I want to thank all three witnesses.

Ms. Richardson, I want to bring out a little bit in your situation. You were convicted primarily because of a tape-recorded telephone call in which you gave a government informant your boyfriend Jeff's phone number so he could, ostensibly, pay Jeff for drugs.

Ms. RICHARDSON. Yes.

Mr. SCHUMER. Why did you give him Jeff's number?

Ms. RICHARDSON. After that drug deal that had gone bad that I was in the car with him, the person that Jeff had got the drugs from, he owed him a lot of money and he didn't have it. And he wouldn't take me home and he made me go with him over to his house. And when he threatened me and my boyfriend with a gun, I was worried about my life. My mom was out of town at the time and I didn't have anybody to turn to. And so when he finally did call I was very interested in getting him in touch with my boyfriend so nothing would happen to him or me.

Mr. SCHUMER. Now, aside from that phone call, did you ever participate in any drug transactions?

Ms. RICHARDSON. No, sir.

Mr. SCHUMER. And five of the codefendants testified you had never had anything to do with any drug transaction prior to that phone call; is that correct?

Ms. RICHARDSON. That is right.

Mr. SCHUMER. To shed some additional light on the egregiousness of your case, I would now like to read into the record some of the things that the judge said about your case at sentencing. He said: "Now I have before me, I believe, the sentences in every, not only every codefendant but everyone that was involved in this conspiracy," and then he goes through the names. John Colgan was the most involved, and Barnes who was heavily involved. Lyle McGahagan who was substantially involved, and Jeff Thompson who was substantially involved. Well, now Colgan got 60 months, Barnes got 24, McGahagan got only 24, Thompson got only 48, Taunton got only 24, and Michelle Taunton who, from my limited experience did not cooperate with the Government——

Ms. RICHARDSON. Right.

Mr. SCHUMER [continuing]. Got 60 months, 5 years.

"I feel that this would be a gross miscarriage of justice to sentence this young woman to 12 years and 7 months without parole considering the fact that all of the real factors in this case, none of them—of the real actors in this case, none of them have gotten more than 5 years. Some have cooperated extensively and deserve it. But even so," and I am taking excerpts here, "it is just a miscarriage of justice to pick one who may be the least involved of all and sentence her to six, over six times the time of William Barnes and Lyle McGahagan. Something is drastically wrong with that." And so I think that bears understanding.

OK, Ms. Stewart, just a couple of questions, and then one for the whole panel. First, I just want to correct you on a couple of things.

The minimum sentence on a first-time gun offense is not 15 years, it is 5. The case you brought up must have been repeated gun offenses.

Ms. STEWART. I believe I said the Armed Career Criminal Act, which is a 15-year mandatory minimum.

Mr. SCHUMER. Only after repeated violations. The first one is 5, I believe.

Ms. STEWART. Right. That is right.

Mr. SCHUMER. OK.

Ms. STEWART. If I stated that incorrectly, I apologize.

Mr. SCHUMER. Second, just one other fact about Ross Perot sucking everyone into the system. Ten years ago before mandatories, about 5 percent of all the drug cases were at the Federal level, 95 percent at the State and local. That is the same as today. So maybe there is a change in the types of cases, but the percentage that are done federally versus State and local have stayed the same.

Ms. STEWART. You have those figures?

Mr. SCHUMER. Yes.

Ms. STEWART. OK. Well, I can't address that because that is not my expertise.

Mr. SCHUMER. Now, my question to all three of you. You have brought up what I believe is to be some truly egregious cases. As I have said before, I think something should be done about these kinds of cases. Although I just want the record to show there were 375 marijuana plants at Mr. Stewart's brother's house.

Ms. STEWART. That is right.

Mr. SCHUMER. This was not, you know, a little marijuana. That is a huge amount of marijuana.

Ms. STEWART. I think again that is very relative. But granted it is enough for him to go to prison. I don't doubt that.

Mr. SCHUMER. Right. I just don't want anyone to feel that he had a marijuana cigarette in his pocket or in his drawer and got that kind of sentence.

But here is my question. We could easily have had some egregious cases on the other side. We could have easily had a mother of a child who was shot by someone premandatory sentencing, presentencing guidelines, by someone who was let out on probation by a judge for whatever reason.

So why are you lobbying to repeal mandatory sentences, either in one type of offense or all, rather than try and correct, as I said, the relatively small number of egregious cases that exist?

Why is it the repeal of all mandatory minimums you seek? Or better put, wouldn't a safety valve better solve the problem?

Go ahead. You want to answer that first, Ms. Stewart.

Ms. STEWART. Yes, because I think that it is a very critical question and it is a good one.

For one thing, I just spent my 5 or 6 minutes of testimony giving you examples of how mandatory minimums drive the criminal justice system. It is not just a matter of cases that have sentences that are too long. The mandatory minimum sentences are actually a tool used by law enforcement in a very abusive way. That is one reason I would like to see them gotten rid of.

The other is that we don't need them. We have guidelines. We have the sentencing guidelines that this committee and the rest of the Congress felt was the right thing to do in 1984 to create fair and just sentencing that would eliminate disparities, and then they

were never given the chance to operate unfettered, without mandatory minimums.

Mr. SCHUMER. So, in other words, you would support maintaining the guidelines as is?

Ms. STEWART. I certainly do. I think that we will never go back to the days where we had no guidelines at all.

Mr. SCHUMER. Do you agree with that, Ms. La Rotonda?

Ms. LA ROTONDA. I agree.

Mr. SCHUMER. And how about you, Ms. Richardson? Yes.

In a lot of the cases you brought up really the problem is not with the mandatory sentence, at least in my judgment, but with police entrapment, perhaps. Someone uses a gun or carries a lot of crack because a DEA undercover agent told him to do that, he is still doing something very severe. And, if the police went overboard in encouraging the person to do it, it seems to me we ought to deal with that in an entrapment setting rather than blaming the guidelines. Because for everyone of those cases, I would argue, there were probably many where there was no undercover officer present, and somebody did the same thing.

Ms. STEWART. Well, I think that—I have already forgotten your question, frankly.

Mr. SCHUMER. Most of the cases you have sent us seem to me to be not criticism of the mandatory guideline——

Ms. STEWART. Oh, OK. Yes, I will tell you why.

Mr. SCHUMER [continuing]. But rather of police behavior—entrapment.

Ms. STEWART. What you are just saying is exactly the problem. The judge should be able to determine did this guy bring this gun because the DEA told him to, but he can't. All the judge can do is say, OK, there is a gun. I have got to give 5 years.

And you are a lawyer, I am not. But entrapment is very hard to prove.

Mr. SCHUMER. OK. Well, then maybe that is what ought to be changed.

I have only one other point I would make for your consideration. As I mentioned in my opening statement, the GAO will testify that the differences between the minimum mandatories and the guidelines are small. That only in 5 percent of all the cases where the minimum mandatory kicks in is it going to be greater or would it have been greater than the guidelines sentence.

That to me, again, argues that we should focus on those 5 percent of the cases, but not repeal the minimum mandatory for the other 95 percent where the guidelines, which you support, are actually kicking in a tougher sentence than the minimum mandatory.

Ms. STEWART. I would just respond to that by saying that the guidelines are high because of the mandatory minimums. That when Congress gave the Sentencing Commission the mandatory minimums, the Commission raised the guidelines to meet them. And so they are high because of the mandatory minimums, again driven by them.

One more thing. Although we are only talking about 3,189 nonviolent first offenders under your configuration——

Mr. SCHUMER. It's GAO's, really. It is not mine.

Ms. STEWART. OK. Those are human beings, live individuals, whose lives are being destroyed for 10 years, like Nicole's. They are people. They are not just a figure, and I think it is very important to remember that.

Of course, it is hard as politicians to stand in front of the cameras and let your constituents see that, gee, you might be sounding soft on criminals. But that is not what is happening. If you got rid of mandatory minimums, they would still get stiff sentences under the guidelines. And those are human beings we are talking about.

Mr. SCHUMER. Ms. Stewart, I want to deal with the problems that you have brought up and that is why we have this hearing. But I don't want to open the law wide open so that there will be cases, that are not terribly egregious, that then don't get the appropriate sentence.

Ms. STEWART. But they would under the guidelines.

Mr. SCHUMER. And repeal of minimum mandatories, in my judgment, does just that.

Ms. STEWART. OK. And in my judgment, the guidelines would take care of it.

Mr. SCHUMER. I understand. OK.

Ms. STEWART. Thank you.

Mr. SCHUMER. Why don't we go vote and then we will come right back?

So we are recessed for 10 minutes. We will try to resume at 20 after.

[Recess]

Mr. SCHUMER. Mr. Sensenbrenner will resume the questioning.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. First of all, let me apologize for having to leave the hearing after my round of questions. But Governor Thompson is waxing eloquent downstairs on the subject of NAFTA, and this is kind of a compulsory attendance, since he is the Governor of my State.

But I do want to ask you, Ms. Stewart, you have given some powerful testimony and you have appended to your testimony a number of examples from the files of your foundation. And in reading those over, it appears that an issue of either entrapment or abuse by law enforcement officials could have been raised at trial.

Were those issues raised at trial in any of these cases, to your knowledge? And if so, what was the disposition of those claims?

Ms. STEWART. Entrapment was probably raised in some of those cases, because I do know that we get cases where they said they tried to plead entrapment. But I am not a lawyer—Congressman Schumer mentioned this earlier, the entrapment issue—but it is very hard to prove in court. And you must be a lawyer, so you may know that that is true. But entrapment very seldom works, unfortunately.

Mr. SENSENBRENNER. Well, the reason entrapment is not pleaded very often is because anyone who pleads entrapment has to admit that he or she had done the crime, but would not have done so if it were not for the actions of the law enforcement officials. So you are rolling the dice, and if you win you are off, but if you lose you don't have any other leg to stand on. And that is one of the reasons why few criminal defense lawyers use the entrapment plea.

However, more frequently used is abuse of discretion by law enforcement officials, where you don't have to place your client at as great risk, and I am wondering if that was brought up at any of these cases.

Ms. STEWART. I have never heard that referred to in any of our cases.

Mr. SENSENBRENNER. Secondly, and again this amplifies on some of the questions Mr. Schumer posed to you, and that is, with Mr. Schumer's evidence it appears that using the sentencing guidelines would result in a higher sentence than using the mandatory minimums for those folks who were convicted of crimes. How do you respond to that?

Ms. STEWART. He asked this question while you were absent, and my response is that the sentencing guidelines were raised to meet the mandatory minimums when they were both established. That the guidelines were actually raised once Congress gave the mandatory minimums to the Sentencing Commission. So that is why the sentencing guidelines are so high. Again, they were driven by the mandatory minimums.

Mr. SENSENBRENNER. Do you quarrel with the assertion that establishing sentences is a legislative decision rather than a judicial decision?

Ms. STEWART. No, I don't quarrel with that. I quarrel with micromanaging the judges. I do think that the sentencing guidelines serve a very good purpose, and I think that that is the way that we should let the criminal justice system work.

Mr. SENSENBRENNER. The problem is that the judges weren't being managed by anybody back 10 years ago——

Ms. STEWART. I realize that.

Mr. SENSENBRENNER [continuing]. And that is the response of Congress. I think that a lot of us who support the concept of mandatory minimums are awful afraid of the consequences of what would happen if the judges were let loose on their own again.

Ms. STEWART. But that is what I hope that every one of the members of this subcommittee understands that the judges would not be let loose if we got rid of mandatory minimums. They would be tied to the sentencing guidelines, which are very strict, and most judges hate them.

Mr. SENSENBRENNER. Yes. Yes, they hate them. And my father-in-law is a Federal judge, and that and the issue of Federal pay raises are not talked at the dinner table over there anymore.

Mr. SCHUMER. Which more, Jim?

Mr. SENSENBRENNER. Well, we have agreed to disagree on those issues, Mr. Chairman. But the point is that there are a number of judges that would love to be given the excuse to declare the sentencing guidelines unconstitutional, which would put us right back to square one with all of the abuses that occurred prior to 1984.

So just be aware that we in Congress are not arguing this issue in a vacuum. We have, I think, felt we have been burned once by what we felt was judicial indiscretion and which the majority of the American people thought was judicial indiscretion, where people who were convicted of the same crimes got widely disparate sentences. So both the sentencing guidelines and the mandatory minimums were attempts to rope our friends in an equal and coordinate

branch of government in a little bit in terms of how they administer the criminal law to people who have already been convicted of crimes by the jury.

Ms. STEWART. I understand that. I just want to reiterate again that mandatory minimums are not necessary because we have sentencing guidelines. And I don't think there will ever be a consensus to get rid of sentencing guidelines, so I don't think you have to worry about judges with unfettered discretion.

Mr. SENSENBRENNER. I yield to the chairman.

Mr. SCHUMER. If the gentleman would yield—I have heard from a good number of judges that they are opposed to both the mandatory minimums and the guidelines.

Ms. STEWART. No, I agree. I just don't think that the members of this subcommittee or Congress would ever give judges full power again. I think they will always keep their hands tied somewhat, and the sentencing guidelines seem to be the best way to do that.

Mr. SENSENBRENNER. Thank you very much.

Mr. SCHUMER. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. And thank you, Mr. Chairman, for holding these very important hearings. The witnesses are most useful, and especially Ms. Stewart who is very knowledgeable. It seems to me that her point that the Sentencing Commission needs oversight is irrefutable. I was a member of the subcommittee that wrote the bill establishing the Sentencing Board—Commission—and we had all kinds of reservations about it. It needs overseeing, Mr. Chairman; oversight, which it has not received to date, and I am delighted that you are going to look at the Commission because, as Ms. Stewart said, the minute they start setting sentences they use the mandatories. And the consequences, they are just horrific.

We built 29 new prisons, Federal prisons, since 1979, and they are all overcrowded and they want 7 or 8 more. A lot of it has to do with our drug policies, and we have to review them. I am going to put in a bill establishing a commission to give us some guidance as to how we can handle the drug problem in this country, because I assure you we are not doing a very good job.

We have just recently passed both South Africa and Russia in the number of people, proportionately, that we have locked up in prison, and most of the new people in prison were sentenced under our drug statutes.

I think what you said is irrefutable, Ms. Stewart. That is, we set up with great respect the sentencing guidelines and the Commission, and then we turn around and micromanage it. We ought to do one or the other and not tell them what to do. We ought to every year review what they have been doing, talk to them and, if necessary, change some of their rules and regulations.

It is very serious what is going on with these mandatory minimums plus the drug bills and how Congress behaves. We get a crisis like the famous war on drugs that started in the early 1980's and any bill that comes before the House or the Senate, has stiff penalties for any drug offense. I am surprised we don't have 50-year sentences for anybody walking around with a joint or something like that. That is what happens. Members really don't want

to go home and say that they didn't vote for a horrendous penalty for drug use.

We should be more civilized than that. And I think with the quiet study that this committee is engaging in and with the wisdom of all the members and the staff, and especially the chairman, that we are going to get somewhere. It seems to me that your modest suggestion is something that we could not possibly turn down, which is that a first offender, nonviolent offenders, should get some very different treatment. We should not just put them in jail and throw the key away as we do now.

So thank you very much.

Mr. SCHUMER. Thank you, Mr. Edwards. Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. Mr. Chairman, since this panel was presented to us, these witnesses were presented to us as examples of egregious cases, if I understood the Chair. I would like to ask the panel members a little bit more about their particular cases, and I know this is personally difficult, and I am not seeking to retry the case in any way, I just would like a little bit more information, if I could.

If I may begin, Ms. Stewart, I believe that the individual you are referring to is your brother.

Ms. STEWART. Yes, that is right.

Mr. SCHIFF. And the offense which resulted in his conviction resulted in his growing marijuana in the backyard of a house he lived in with others.

Ms. STEWART. Inside the house. He didn't live in, but his friends did.

Mr. SCHIFF. And speaking first of your brother—then I would like to ask about the others—I assume he was growing these for the purpose of selling them, or is that not correct?

Ms. STEWART. He was growing the marijuana with his friends and hoping that they would each end up with 4 pounds of marijuana once they had harvested it. He would have smoked way too much of it himself and he would have sold some to his friends as well. He was 35 at the time of his arrest.

Mr. SCHIFF. Had he done this previously? Had he completed a crop, so to speak?

Ms. STEWART. No, he never had. He had been smoking marijuana on and off since high school.

Mr. SCHIFF. But this, he never completed, that you know of, an actual crop?

Ms. STEWART. He never was engaged in growing it before.

Mr. SCHIFF. Ms. Richardson, I would like to come back and—I am sorry. Pardon me, Ms. Stewart. Can I just come back a second? I apologize.

There were two others, I believe, involved and they got different sentences than your brother did?

Ms. STEWART. They got probation because they turned him in. There was actually a fourth person who set the lights up in the house, and he received a sentence of 23 months, 24 months, something.

Mr. SCHIFF. Ms. Richardson, you say that your involvement was participating in one phone conversation, is that right?

Ms. RICHARDSON. Yes.

Mr. SCHIFF. Would you tell us again exactly what that phone conversation was?

Ms. RICHARDSON. OK. When I told you before that I was in the car when he made one of his transactions, the transaction went bad, he didn't bring the money back. My boyfriend told me what he had done and how much he owed and who he owed me to, and then he took me to his house and he threatened his life and my life if we didn't get the money back.

So about 4 days later the guy that owed Jeff the money calls my house and he wants to know where my boyfriend is. Well, by this time this guy has been calling my house and threatening me and coming over there, and I didn't know what to do.

Mr. SCHIFF. Who owed the money to whom? Did your boyfriend owe the money or was he owed the money?

Ms. RICHARDSON. Jeff owed the money to the person he got it from.

Mr. SCHIFF. Pardon me. Is Jeff your——

Ms. RICHARDSON. Is my boyfriend, yes. And someone owed the money to him to pay to that guy.

Mr. SCHIFF. OK.

Ms. RICHARDSON. And when he called asking——

Mr. SCHIFF. So Jeff was not paid by someone and therefore still owed someone else.

Ms. RICHARDSON. Right.

Mr. SCHIFF. OK. Right. All right.

Ms. RICHARDSON. Right. And I was worried for my life and my boyfriend's, and sure I am going to give him the number as to where my boyfriend was. And I had asked him what had happened.

Mr. SCHIFF. This was 4 days later?

Ms. RICHARDSON. It is about 3 days later. Two or three days.

Mr. SCHIFF. And other people who were in that situation, how were they sentenced, compared with your own?

Ms. RICHARDSON. I was found a minor participant, and it was proven throughout my trial that no one ever bought anything from me and I never sold anything to anyone, never carried drugs for the conspiracy, anything like that. The major players in the case—let's see—two that were my boyfriend on this little ladder, they got 5 years. My boyfriend, who was under them, got 4 years. The first people that got busted, that turned in my boyfriend, got 2 years.

Mr. SCHIFF. How much time did you receive?

Ms. RICHARDSON. Ten years.

Mr. SCHIFF. So you got the most sentence, incarceration of everyone involved?

Ms. RICHARDSON. Exactly.

Mr. SCHIFF. Thank you. Ms. La Rotonda, your statement about your brother——

Ms. LA ROTONDA. My son.

Mr. SCHIFF. Son. I beg you—please excuse me. Of course.

It says everything except what exactly he did. In other words, it said that if the promise was $2,000 he got involved as a minimal participant in a large drug case, exactly what was he paid $2,000 to do?

Ms. LA ROTONDA. His friend asked him that one particular night to take a ride into Manhattan, and my son being a friend of his

from childhood said, OK, and the amount of $2,000 was mentioned as an influence to let him come with him, and that is all he did. He sat in the car. He didn't even leave the car other than to let his friend's friend know that he arrived. He went back into the car and that was it.

He wasn't even arrested that night. He left.

Mr. SCHIFF. What was he paid $2,000 or offered $2,000——

Ms. LA ROTONDA. He would have been paid $2,000 just to take the ride with his friend. Unfortunately, which is not brought up because we did not go to trial, his friend's father owned an import-export business and he was well-to-do. And through my son's childhood, kindergarten, first, second and third grade, et cetera, we weren't capable of, unfortunately, buying everything for my son, so his friend would offer to buy him a pair of sneakers or take him to a movie or whatever.

So, even though the money was mentioned, my son was more or less doing a favor, also. He did know it was drugs. Unfortunately, he had no idea the amount. It was 4.9 kilos of heroin and I don't think—and I know my son would have never went for no amount of money.

Mr. SCHIFF. And the other participants were also sentenced; is that right?

Ms. LA ROTONDA. The informant received nothing. His friend received 5 years. My son did get 10 years. And the major Colombians involved did get 15.

Mr. SCHIFF. All right. Mr. Chairman, before I yield back I would like to make two brief observations. The first is a common thread here remains that all of the individuals involved voluntarily participated in some way in drug trafficking, and therefore are legitimately susceptible to serving time in prison, I think.

However, there is one other aspect of this that I think has been pointed out by all three of these witnesses, and that is—and I think it is an extremely significant one and perhaps a subject for another hearing, if you choose. There really, no matter whether one agrees with mandatory sentences or doesn't agree, there really is no such thing as a mandatory sentence, because a mandatory sentence only takes place if the prosecutor chooses to charge the offense that results in a mandatory sentence.

If someone commits an offense that Congress says upon conviction ought to be a matter of minimum sentence, if the prosecutors choose to make pretrial agreements or testimony or whatever and not make the charge, then the prosecutors have eliminated the mandatory minimum sentence.

And one of the complaints I have heard over and over again is that the prosecutors at times misuse that authority. We all understand who have practiced criminal law that the use of criminals to testify against other criminals is a necessary part of criminal law practice. I never had a case like the old Perry Mason's where someone stood up in the back of the courtroom and confessed 55 minutes after the program began.

Mr. SCHUMER. That is why there was never a program about Steve Schiff the prosecutor.

Mr. SCHIFF. That is right. Although I don't know how that district attorney got reelected. He never won a case.

Mr. SCHUMER. Hamilton Burger.

Mr. SCHIFF. Hamilton Burger never won. I won a few when I was a prosecutor.

But here is the point I am making. The point I am making is one of the complaints about mandatory minimums is that the prosecutors misuse the legislation in the sense that oftentimes a more egregious criminal is used to testify against the less egregious criminal resulting in the more serious offender getting less of a sentence because the charge is dropped. And what that suggests is a hearing on criminal charging policy by the U.S. attorney's office. How are they using this law, since they can manipulate it?

I thank you, Mr. Chairman, and I yield back.

Mr. SCHUMER. Thank you, Mr. Schiff, once again for your thoughtful questions. We will see if we can, within the docket of our busy jurisdiction, look into that.

Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. And let me thank our panel for coming. I know this is not easy for anyone of you to come forward and talk, particularly on a day in which the cameras and the lights and this type of attention. But we appreciate it, because if we are going to do the right thing, we want to learn of the egregious cases, as Chairman Schumer has said.

I would just make a few comments and maybe ask a question. One, when the chairman corrected you, Ms. Stewart, about the penalties for using a gun, you said that that is not your expertise and you yielded to him on that point. The first-time offender was 5 years and only multiple.

I would just with great affection suggest that you be very careful about your use of any statistic, because I think one of the big problems we have in this whole affair is trying to figure out what in fact is going on, who is getting the 15-year sentence and who is, in fact, getting the 5-year sentence. So it is extremely important to be very accurate in what you are saying because—not just with respect to your brother, but with respect to the organization you head, you don't want to be adding to the misinformation and the mythology that I think has grown up around this subject. You want to be absolutely accurate.

So I would suggest that in your statement that from hence forward that whenever there is any reference to data that it be actually tested out.

Ms. STEWART. May I respond to that?

Mr. MAZZOLI. Yes. Certainly.

Ms. STEWART. I, because I am nervous and testifying, I am not sure what I said. But certainly in my written statements I made it very clear that the 15-year sentence was for an armed career criminal act and that a gun just at a drug offense on a first time will get a 5-year sentence. I am quite clear on that.

Mr. MAZZOLI. I thank you very much.

Ms. STEWART. And I do appreciate your comments. I have also taken great caution in making sure that we at FAMM don't misrepresent the facts, and I don't believe that I have in any of my written statement. If I said something in error orally, I apologize.

Mr. MAZZOLI. Of course, a career criminal contemplates several earlier offenses. So I mean in that setting it would be well to say that there is a buildup to that 15 years.

But, in any event, I just mention that. Just be sure that the numbers are correct.

I think in that setting too, I believe it was Ms. La Rotonda mentioned that—somewhere in your statement, I believe, that it is not a happy thing when violent criminals are released to make room for nonviolent offenders. Are you aware that is actually happening?

Ms. LA ROTONDA. I have seen it in the papers. I have an article at home that states, I think it is under the State, I might be incorrect, that they are. But still a criminal, no matter if it is a violent, they shouldn't be let out, and this is what is happening under the State level. What is the difference Federal or State? To me, I don't know. But I know if a violent criminal is being let out, a nonviolent is put in——

Mr. MAZZOLI. I intend to ask because I think what we need is a collection of accurate data to show how many and what cases are being let out. I would say parenthetically, and the chairman I have talked about this over the years, and that is, that when you talk about nonviolent criminals, and here is a chairman that sits on the Banking Committee, we have some wonderfully nonviolent criminals who I would hate to see let out——

Mr. SCHUMER. I am not on the Banking Committee any longer, Mr. Mazzoli.

[Laughter.]

Mr. MAZZOLI. Let me rephrase, Mr. Chairman. Obviously, the people that you all fingered are the ones that I am talking about. But the S&L, the big shot swindlers of the S&L's and the bank and the desperadoes that have left Americans in many cases impoverished because of their messing around with their invested money, and I would hate to see these people released—they are nonviolent. I mean they didn't commit any act of violence. But they certainly have done something terrible to American society and they shouldn't be let out either.

So when we are talking about having, for example, first-time nonviolent offenders to be given some kind of careful treatment or even just a little pat on the wrist you have got to be very careful, because some of the first-time nonviolent offenders are the very people we have to put away from a long period of time to make an example that just because you wear a white collar instead of a blue collar that somehow you are going to be exempted from it. So I think we have to look at it.

And I would say—Chairman Schumer mentioned that much of what has struck him as being these egregious cases have in part resulted from, perhaps, prosecutorial overreaching or in some cases maybe abuse. I think, Ms. Stewart, you used the term "unscrupulous law enforcement officers." I am not sure exactly what you meant, but I assume you meant prosecutors who sometimes manipulate or do this. And certainly we don't want to let that happen.

But, on the other hand, I don't think we ought to be too prone to change mandatory minimums or sentencing guidelines because they are used mischievously by prosecutors. It gets to the point that we need to deal with those prosecutors, clean them out, give

them orders, make sure that they follow the instructions from their superiors and from eventually Washington, but not necessarily to change the guidelines because they may not be what is at fault. It may be just simply the lack of the right kind of prosecutor at the local level.

Mr. Chairman, let me just read a few data, and I would ask that they be verified at some point, and that the chairman allow me to put it in the record. It is a July study, July 1993, issued by the U.S. Advisory Commission on Intergovernmental Relations, USACIR, dealing with State prisons in 1991—State prisons 1991.

The data says: Most people in State prisons in 1991 were exactly the sort of dangerous felons that we think ought to stay in. Only 7 percent of those in State prisons in 1991 were nonviolent first-time offenders. Only 7 percent. Only 25 percent were convicted of drug offenses. Only 25 percent. Sixty percent were serving or had served time for violent crimes. Sixty percent of all of the people in the prisons at the State level in 1991 had served time for violent crimes. Thirty-three percent of that group were nonviolent offenders but had been behind bars before. They had been earlier incarcerated. And 50 percent of that group was in prison at least the fourth time.

We made need to verify that data to show whether it is accurate or not, and note that is for State prisons, it is not the level—for Federal prisons. But that does amplify what Chairman Schumer has said. We may be dealing with a myth. We may be dealing with a chimera that has somehow risen in the background here, and we need not make great changes if we are not dealing with that.

Mr. Chairman, thank you.

Mr. SCHUMER. Thank you, Mr. Mazzoli. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. First of all, I commend you for undertaking this reexamination of the problem between mandatories and the uniform sentencing guidelines. Just between the witnesses, we are in one heck of a mess up here, because in our zeal to punish all these bad people, as Don Edwards pointed out, we seem to have more bad people than any other country on the face of the Earth. We have now conflicted ourself with our own laws because the mandatories supersede the uniform guidelines. Well, the uniform guidelines were supposed to create the level playing field that has been referred to as what was required because there were too many people coming before "soft" judges that were actually taking into cognizance the facts of the matter of each case, the unusual circumstances, the background of the defendant, and people, we were told, were enraged.

Also, it is very political to be tough on crime. I know this does not come carefully to your attention, but politicians love to brag about how much tougher they are on crime than their weak-kneed, soft-bellied, liberal opponent who is easy on crime by inference, although he may be saying he is tough on crime too, and so we get into the usual bidding war.

"I voted for 15 mandatory, new mandatory death penalties in the crime bill."

"Oh, is that all? I voted for 20."

"Well, I voted for 10 others in another bill that weren't in there, so I am still tougher on crime than you."

In the meantime, crime keeps going up. Michigan went bankrupt with a good Governor because we built so many State prisons that we couldn't even open them up after we had built them because we had no money to staff them. It took another 12 to 16 months to open up the prisons that we busted ourselves in tax effort trying to do.

So the problem that the chairman has caused us to come together around is not only a serious substantive public matter about how we deal with crime in our society, but it is also fraught with political implications.

Now, what do we do? Well, if I read my colleagues correctly, what we are saying is enough of the bidding war game. Let's begin to examine this matter on the basis of the efficacy of the particular laws. We are not so caught up in our own arrogance that we can't say some laws do not work as well as other laws, and we are going back in an attempt—and this is not the first hearing on this, in an attempt to sort these kinds of considerations out in a serious way. And so your presence as witnesses is very, very important.

In a previous hearing this subcommittee had members of the judiciary telling us what their experience was among their brethren on the bench, and it was very important to us because they were representing as officers in the judicial center, the Federal judicial center, they were representing judges who tell them of the enormous problems that they have in trying to just administer the law as we have told them what the law ought to be.

And so this is a continuing series. It is very important. And I would like to ask you to just tell me a little bit about the effort of citizens like yourselves whose family members are caught up in these legal tragedies and what you are trying to do about it.

Ms. STEWART. Well, I guess I will speak for this group because all three of us are members of Families Against Mandatory Minimums and I believe we are the only organization in the country working to change these laws.

Our effort is first and foremost to get the people who have been affected by mandatory minimums to realize that they are not alone and that there is an organization working to help them change the law, and to use their cases—and we have nearly 7,000 cases in our office of people serving mandatory minimum sentences—in forums like this to help the Members of the Congress understand who is, in fact, going to prison under the mandatory sentencing laws, to help the media when they want to do, stories on this issue, to give them examples. Nicole's case was brought to my attention by her mother who called and said that she was frantic. Her daughter, her only daughter was going to prison for 10 years, first offense, no guns or anything.

I talked to her mother and realized this was a perfect example, so we got more information and Nicole agreed to let us use her case, to publicize it and to have her be here today to talk about it.

So our effort is really two pronged—to educate the American public so that they realize that these mandatory sentences exist, and that they are unnecessary because the guidelines can do the job just as well, if not better; and to educate the Members of Congress and help them understand that they have constituents who have been affected by these laws.

Mr. CONYERS. Well, thank you very much.

Mr. Chairman, I had erroneously stated that—it was in our committee that we had had hearings on the Federal judiciary.

Mr. SCHUMER. I asked my staff had they been holding hearings and I wasn't invited.

[Laughters.]

Mr. CONYERS. Members have occasionally thought of that, but we checked ourselves immediately upon someone having made that suggestion. But it was our colleague Bill Hughes, the former Chair of the Crime Subcommittee.

But I thank you for your description. I think we are doing something important. That a lot of Members are beginning to see now that in a way the fruits of our work have gotten terribly complicated. There is nobody I know on this committee, in the Congress that is soft on crime. I mean we have, particularly those of us who come from regions that are more affected by the ravages of criminal conduct, that is the last thing that you are going to run into, any softies around here.

But what we are trying to do is be sensible about dealing with crime. Emotionalism is not going to reduce the pattern of crime, and doing the wrong things to people who violate the existing statutes is not going to reduce the crime numbers or the objective that originally was the point of incarceration; namely, to rehabilitate the individual. So I am very happy to be a part of these hearings, and I thank you very much.

Mr. SCHUMER. Thank you, Mr. Conyers. We appreciate your being here and your input and your experience.

OK. Well, I want to thank the panel. As I think a number of Members have mentioned, it is not easy to come here and testify. But I think you elucidated a part of the problem that we ought to be examining, and I thank you very much for coming.

Ms. STEWART. Thank you.

Ms. RICHARDSON. Thank you.

Mr. SCHUMER. OK. We would ask Mr. Henry Wray to come forward. While I am asking Mr. Wray to come forward, I found a—it is not just a 29-cent pen but a very nice black pen up here. So if someone left it up here they may come up and get it. I don't know what—what kind of pen is this called? A Cross pen.

Mr. SCHIFF. I think it is mine, Mr. Chairman.

Mr. SCHUMER. OK. Is that yours? Whoever said there was no bipartisanship on this committee?

OK. Our second panel consists of one witness and he is accompanied by two others. Our witness is Mr. Henry Wray. He is the Director of Administration of Justice Issues within the General Government Division of the U.S. General Accounting Office. His Division provides legal support for the GAO's audit work with the administration of justice, and he will testify today about a very comprehensive 3-year study performed by the GAO on mandatory minimum sentencing. As I mentioned, I don't think the full report is scheduled to be out until about September, is that right, Mr. Wray?

Mr. WRAY. Yes. We will get it out in September.

Mr. SCHUMER. OK. Well, thank you for coming. We have received your prepared remarks. They will be entered, without objection,

into the record, and you will have 5 minutes to make your presentation.

I would just note you are accompanied by two of your associates, Linda Willis and Lynn Gibson, who is the Associate General Counsel of the GAO. We welcome both of you.

Mr. Wray, you may proceed.

STATEMENT OF HENRY R. WRAY, DIRECTOR, ADMINISTRATION OF JUSTICE ISSUES, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY LINDA WILLIS AND LYNN GIBSON

Mr. WRAY. Thank you, Mr. Chairman. I am pleased to be here today to discuss the results of our work for the subcommittee on mandatory minimum sentences. At your request, we reviewed whether offenders convicted of crimes carrying a mandatory minimum sentence received that sentence, how local practices influence mandatory minimum charging decisions, the relationship between the sentencing guidelines and mandatory minimums, and race, gender, criminal history and other characteristics of individuals who received mandatory minimum sentences.

We reviewed 900 cases in eight judicial districts where the offender was convicted of a drug or a firearms offense, and where according to the arrest records the potential existed for carrying a minimum mandatory sentence. In 595 of these cases the offender was, in fact, convicted of an offense carrying a mandatory minimum sentence. In the remaining 305 cases the offender was convicted under a statute that did not carry a mandatory minimum.

I will briefly summarize the results of our review of the 595 cases that resulted in convictions under the mandatory minimum statutes. More detailed information is presented in various tables appended to my statement.

In all of the 595 cases the defendant was either sentenced to at least the mandatory minimum amount of prison time required by the statute or received a lesser sentence as a result of a substantial assistance motion. The mandatory minimum statutes permit an exception to imposing the mandatory minimum sentence where the prosecution files a motion for a lesser sentence based on the defendant providing substantial assistance in the investigation or prosecution of another party and the judge grants the motion and agrees to depart from the mandatory minimum sentence. There were a total of 104 substantial assistance motions in the 595 cases we reviewed, and 91 of those motions resulted in a sentence below the mandatory minimum.

How prosecutors viewed substantial assistance varied in the districts we reviewed, as did the number of departures granted in each—or the proportion of departures granted in each district. In the remaining 305 of the 900 cases we reviewed the defendants were not convicted of charges carrying a mandatory minimum sentence. Either these defendants were never actually charged with a mandatory minimum offense or such an offense was charged initially and later dropped or changed to some other offense that didn't carry a mandatory minimum.

On the basis of the information in the case files we reviewed we couldn't determine for individual cases why a mandatory minimum

charge was dropped or never brought in these cases. However, according to a Justice Department official, key concerns that may result in mandatory minimum charges not being pursued in specific cases include the quality of the evidence, district workload and the relationship of the particular case to the prosecution of more important cases.

In addition, we did identify several general charging policies within some of the districts that influenced decisions on whether to pursue mandatory minimum convictions against certain categories of defendants. For example, the Eastern District of New York has a large number of drug cases involving couriers who are apprehended at J.F.K. International Airport with drug amounts that would indicate a mandatory minimum violation. However, the district's general policy is to charge couriers under a statute that does not carry a mandatory minimum sentence.

We also found that at one time the Southern District of Texas avoided the application of mandatory minimums by eliminating the evidence to be considered in prosecuting a case, such as the quantity of a drug seized. However, this practice of eliminating proof was abandoned in October 1991.

Prosecutors in the Central District of California and the Southern District of California stated that they sometimes avoid mandatory minimums by charging defendants under a drug-related statute that doesn't carry a mandatory minimum.

We found that some U.S. attorney's offices have declination policies that establish drug thresholds for prosecution that exceed the mandatory minimum amounts. Prosecutors in some districts told us that their declination guidelines were based primarily on resource considerations. They also noted that the declination guidelines were adhered to only generally, and that cases not prosecuted at the Federal level may still be prosecuted in State court. It wasn't possible for us to determine how often this actually happened in the cases we reviewed.

We also looked at the relationship between mandatory minimums and the Federal sentencing guidelines established under the Sentencing Reform Act of 1984. The earlier statements and testimony have touched on this quite a bit. The guidelines prescribe base offense levels for Federal crimes consisting of a range of months. A range is then fixed for purposes of sentencing based on the defendant's criminal history and a series of potential upward or downward adjustments which take into account such factors as the defendant's role in the offense and other aggravating or mitigating factors.

The Commission used mandatory minimums to anchor the base offense levels under the guidelines for drug offenses. For example, when Congress enacted a mandatory minimum for an offense involving a specified quantity of drugs, the Commission's guidelines prescribed a base offense level that approximated the minimum sentence established by the statute.

Sentences are first calculated using the guidelines system regardless of whether a mandatory minimum charge is involved. When the defendant is convicted under a statute that carries a mandatory minimum sentence exceeding the guidelines sentencing range after it has been determined through the application of the

various adjustments that are called for in the guidelines, the mandatory minimum in effect trumps or supersedes the guidelines sentence range and becomes the sentence imposed.

As the chairman mentioned earlier, this happened only in about 5 percent of the cases we reviewed. In approximately 70 percent of the drug cases carrying mandatory minimum sentences, the guidelines sentencing range exceeded the mandatory minimum required by statute, and consequently was the sentence imposed. In the other 25 percent of the cases the guidelines range encompassed the mandatory minimum, so the mandatory minimum would have been set within that range.

The average sentences in the drug cases we reviewed significantly exceeded the mandatory minimum. Drug offenders convicted under statutes carrying a 60-month mandatory minimum who did not receive a substantial assistance departure were sentenced to an average of 81 months, as opposed to the 60 months that the mandatory minimum would have called for. For those convicted under statutes with a 120-month mandatory minimum, the average sentence was 167 months. Again, these various findings from our review are laid out in the attachments to my prepared statement.

Offenders receiving mandatory minimum sentences in the eight districts we reviewed had several common characteristics. In all districts they were most frequently male and between the ages of 21 and 40. In five districts the majority were first-time offenders, although in one district over 80 percent were repeat offenders. In five districts Hispanics were most frequently represented; in two districts, blacks; and in one district, whites. Most offenders had less than a high school education. But again, these profiles differed in some respects by the districts that we looked at.

Again, our findings in terms of the characteristics of the offenders are summarized on table 1 of my full statement and then further detail is provided in the appendix. I would emphasize that we did the best compilation we could in terms of the characteristics of these defendants. The findings that we have in terms of race and other factors are not really generalizable beyond the limits of the cases we had. They don't really indicate whether there is or is not some overriding pattern of racial or other disparity in the application of the minimum sentences.

That concludes my statement, Mr. Chairman. We would be happy to answer any questions.

[The prepared statement of Mr. Wray follows:]

PREPARED STATEMENT OF HENRY R. WRAY, DIRECTOR, ADMINISTRATION OF JUSTICE ISSUES, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the results of our work for this subcommittee on mandatory minimum sentences.[1] At your request we reviewed: Whether offenders convicted of crimes carrying a mandatory minimum sentence received that sentence; how local prosecutorial practices influenced mandatory minimum charging decisions; the relationship between the federal sentencing guidelines

[1] Mandatory minimum sentences are those for which a minimum period of incarceration is specified by statute. For defendants convicted under statutes containing mandatory minimum provisions, judges are required to impose a period of imprisonment not less than the minimum number of years specified. These defendants cannot receive probation or suspended sentences.

and mandatory minimums sentences; and race, gender, age, criminal history, and education characteristics of offenders receiving mandatory minimum sentences.

We reviewed 900 selected cases in 8 judicial districts in which defendants were convicted of a federal offense and, according to arrest records, the potential existed for a charge carrying a mandatory minimum sentence. Specifically, we selected cases where the offender was arrested for an offense involving either a mandatory minimum amount of drugs or the presence of a firearm.[2] In 595 of the cases, the offender was convicted of an offense carrying a mandatory minimum sentence. In the remaining 305 cases the offender was convicted under a statute not carrying a mandatory minimum.

Background

Traditionally, Congress has established in statute broad sentencing ranges for specific crimes. Judges then imposed a sentence within the statutory range. Judges had wide discretion to sentence in accordance with their own theories of justice and rehabilitation. However, with enactment of the Sentencing Reform Act of 1984, Congress made fundamental changes to federal sentencing policy in an attempt to bring more certainty to sentences and to reduce sentencing disparity. The act created the United States Sentencing Commission and required it to develop a system of sentencing guidelines.

In 1984 and subsequent years, growing concern over drug use and associated crime also led Congress to enact mandatory minimum sentences as a way to get tough on drug crimes and as a means of meting out sure and certain punishment. Mandatory minimum sentences were intended to send to those involved in violence and drug activities a different message that convictions under those statutes will result in specific periods of incarceration.

Most Frequently Imposed Mandatory Minimum Sentences

As of December 31, 1991, there were about 100 federal mandatory minimum penalty provisions included under 60 different criminal statutes, dating back to the 18th century. However, four recently-enacted statutes dealing with drugs and firearms account for more than 90 percent of all mandatory minimum convictions. These four statutes encompass the following offenses:

Manufacturing or distributing controlled substances: conviction under 21 U.S.C. 841 carries minimum sentences of 5, 10, 20 years, or life imprisonment, depending upon the quantity of drugs involved, whether death or serious bodily injury occurred, and whether the offender has previous convictions under this or other statutes.

Possessing a mixture containing a cocaine base: conviction under 21 U.S.C. 844 carries a sentence of not less than 5 or more than 20 years for amounts exceeding 5 grams if this is the offender's first conviction under the statute, and for lesser amounts if the offender has previous convictions under the statute.

Importing/exporting controlled substances: conviction under 21 U.S.C. 960 carries minimum sentences of not less than 5, 10, 20 years, or life imprisonment, depending upon the quantity of drugs involved, whether death or serious bodily injury occurred, and whether the offender has previous convictions under this or other statutes.

Using or carrying a firearm during certain drug or violent crimes: conviction under 18 U.S.C. 924(c) carries a mandatory minimum sentence of 5, 10, 20, 30 years or life imprisonment depending upon the type of firearm involved and whether the offender has previous convictions under this statute.

Mandatory Minimum Sentences Imposed When Warranted by Conviction

Our review of the 595 cases in our sample in which the offender was convicted of violating a statute carrying a mandatory minimum sentence showed that the defendant was generally sentenced to at least the mandatory minimum amount of prison time. The exceptions were cases in which the prosecution filed a motion for

[2]These 900 cases represent all cases that met these criteria during the randomly selected months of February, May, September, and October 1990. The eight judicial districts we selected the cases from were the eastern district of New York (EDNY), the southern district of New York (SDNY), the southern district of Florida (SDFL), the southern district of Texas (SDTX), the central district of California (CDCA), the southern district of California (SDCA), the northern district of Illinois (NDIL), and the district of Nebraska (NEB). The results of our work apply only to those cases we reviewed. They are not generalizable to other cases in the eight districts, nor to all districts nationally.

a lesser sentence based on the defendant providing substantial assistance in the investigation or prosecution of another party, and the judge agreed to depart from the mandatory minimum sentence.

The substantial assistance motion allows departure from both drug and firearm mandatory minimum sentences.[3] The impact of a substantial assistance motion on the length of sentence can be significant because it eliminates any statutory or guideline sentencing requirements. However, judges are not required to sentence below the mandatory minimum if a substantial assistance motion is filed.

In every district, prosecutors filed motions for substantial assistance—allowing judges to sentence below the mandatory minimum. All 104 of the substantial assistance motions in the cases we reviewed were part of plea bargaining agreements. In 91 of these cases, the sentence imposed was below the mandatory minimum.

VIEWS ON SUBSTANTIAL ASSISTANCE MOTIONS DIFFERED

How prosecutors viewed substantial assistance varied in the districts we reviewed, as did the number of departures granted. According to prosecutors in the southern district of New York, they are "generous" with substantial assistance motions. Conversely, motions for substantial assistance occur less frequently in the central district of California. In this district, a substantial assistance motion requires the defendant's full cooperation, willingness to testify before a grand jury or any other trial jury, provision of information leading to other significant offenders, and admission of culpability in the offense.

In most of our cases, judges were receptive to motions for substantial assistance. In seven out of eight districts, judges departed from the mandatory minimum sentence for most or all defendants who received a substantial assistance motion. In contrast, in the northern district of Illinois judges did not depart from a mandatory minimum for 8 out of 17, or almost half, of the defendants for whom substantial assistance motions were filed. District specific results on substantial assistance are detailed in table I.1 in the appendix.

District Policies and Practices Influenced Charging Decisions

In 305 of the 900 cases we reviewed, the defendants were not convicted of charges carrying mandatory minimums. In 198 of the 305 cases, charges carrying mandatory sentences were originally filed but later dropped, and the defendant was convicted under a statute without a mandatory minimum provision. In the remaining 107 cases, no mandatory minimum charge was ever brought. Most of the charges dropped, reduced, or never filed were drug charges. Tables I.2 and I.3 in the appendix provide a district breakout of these cases and illustrate the type of charges either dropped/reduced or never filed.

Prosecutors consider many factors in making charging decisions. On the basis of the information in the case files we reviewed, we were unable to determine for individual cases why a mandatory minimum charge was dropped, reduced, or never brought. According to Justice officials, key concerns that may result in mandatory minimum charges not being pursued in specific cases include the quality of the evidence, district workload, and the relationship of the particular case to the prosecution of other more important cases.

We did identify several district charging policies and practices that influenced decisions whether to pursue mandatory minimum convictions against certain categories of defendants.

COURIERS

The eastern district of New York had a large number of drug cases involving couriers who are apprehended at J.F.K. International Airport with drug amounts that indicated a mandatory minimum violation. However, the district's general policy was to charge couriers under a statute that did not carry a mandatory minimum sentence.

According to district prosecutors there were three reasons why they generally did not charge these couriers under mandatory minimum statutes:

Resources are limited, i.e., with the number of drug courier cases in the eastern district of New York if prosecutors were to charge them with mandatory minimum drug amounts and increase the number of cases going to trial the court would be overwhelmed;

Most couriers have limited culpability; and

[3] All substantial assistance motions in our sample involved drug offenses.

Judges in the district generally disliked sentencing such low-level offenders to mandatory minimums.

"LIMITING PROOF"

In the southern district of Texas we found that some plea agreements included the practice of "limiting proof" or limiting the evidence to be considered in prosecuting a case. This often had the effect of reducing the amount of drugs on which the sentence is based. According to a senior prosecutor in the district, limiting proof was originally used to avoid mandatory minimums because of the belief that the sentences were too severe. Prosecutors also limited proof to expedite case disposition and to account for their lack of confidence in the technique used to determine drug amounts.[4]

In October 1991, the U.S. Attorney's office in the southern district of Texas eliminated the practice of limiting proof as a means of avoiding mandatory minimum sentences. Other practices aimed at avoiding or reducing mandatory minimum charges—such as dividing the "load" between codefendants in order to reduce the criminal exposure of each, dismissing the mandatory minimum gun count to secure a plea, or refraining from seeking an enhancement that is readily provable—were also eliminated.[5]

ALTERNATIVE CHARGES BROUGHT

Prosecutors in the central and southern districts of California stated that they sometimes avoided drug mandatory minimums by charging defendants under 21 U.S.C. 843(b) for use of a communication facility (usually a telephone) with intent to commit a drug offense.[6] For example, in some instances the charge was used for low-level defendants in cases where higher level defendants had been convicted. According to prosecutors, this expedited the prosecution of the lower level defendants and allowed them to focus on more significant cases.

PROSECUTIVE THRESHOLDS

Prosecutive guidelines generally govern the types, level, and severity of cases a U.S. Attorney's office will prosecute or decline to prosecute. We found that some U.S. Attorneys' offices had declination policies that established drug thresholds for prosecution that exceeded mandatory minimum amounts. Accordingly, they have declined to prosecute cases involving a mandatory minimum amount of drugs. In addition, federal investigators told us that some cases involving a mandatory minimum amount of drugs may not have been referred for federal prosecution if the agent knew the amount of drugs involved is below the threshold for prosecution in a particular district.

Five of the eight districts we reviewed had established prosecutive guidelines based on specific drug amounts. Of these five districts, three had declination policies with drug thresholds for some drugs that were higher than the mandatory minimum threshold drug amounts. Prosecutors in some districts said that their case acceptance policies were based primarily on resource considerations. Prosecutors said that the acceptance criteria were viewed as guidelines and were adhered to only generally. If a case was not prosecuted at the federal level, it may have been prosecuted in state court. However, it was not possible for us to determine how frequently cases were referred to the states for prosecution.

GUIDELINES SENTENCES VERSUS MANDATORY MINIMUMS

The Sentencing Reform Act of 1984 required the United States Sentencing Commission to develop sentencing guidelines that apply to defendants convicted of offenses occurring on or after November 1, 1987. Under the statute, all sentencing decisions for convicted felons must comply with the sentencing guidelines. The guidelines required that sentencing should be neutral as to race, gender, creed, national origin, and socioeconomic profile of offenders, while taking into account the nature of the circumstances of the offense and the criminal history of the offender.

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[4] According to a senior prosecutor in the southern district of Texas, DEA's weighing technique relies on a sampling method for the quantity of drugs and the quantity of packaging.

[5] 18 U.S.C. 924(c) is an example of a statute that operates as an enhancement. If a conviction is obtained for both the underlying offense and section 924(c), the 924(c) penalty must be made consecutive to the sentence for the underlying offense.

[6] The relevant sentencing guideline was amended as of November 1, 1990, to take into account the severity of the underlying drug offense committed, thus exposing the defendant to a higher sentence. Our sample of defendants were all sentenced prior to the amendment date.

While the Commission was compiling data and calculating guidelines, Congress enacted additional statutes requiring mandatory minimum sentences for certain drug and firearms violations. The Commission used mandatory minimums to "anchor" the guidelines for drug offenses. Where Congress enacted a mandatory minimum for a specific drug amount, the Commission set the guidelines for similar offenses at a base offense level that reflected the minimum sentence established in the statute.

When a defendant is convicted under a statute that carries a mandatory minimum sentence that exceeds the guidelines sentencing range (after any adjustments, e.g., for role in offense), the mandatory minimum becomes the sentence to be imposed.

In the 595 mandatory minimum cases we reviewed, 573 were for drug related offenses. In 402 of these cases (70 percent), the offender's minimum guidelines sentence was higher than the statutory minimum. In 142 of the cases (25 percent), the guidelines sentence range included the mandatory minimum. In only 5 percent of these cases was the mandatory minimum sentence imposed higher than the maximum guidelines sentence. This finding also varied by district; district-specific results are provided in table I.4 in the appendix.

Drug offenders convicted under statutes carrying a 60-month mandatory minimum who did not receive a substantial assistance departure were sentenced to an average of 81 months. For those convicted under statutes with a 120-month mandatory minimum, the average sentence was 167 months. Table I.5 in the appendix provides a district breakdown of the offenders in each category and the average sentences.

Offender Profiles

Offenders receiving mandatory minimum sentences in the eight districts we reviewed had several common characteristics. In all districts they were most frequently male and between the ages of 21 and 40. In four districts the majority were first-time offenders, although in one district almost 80 percent were repeat offenders. In five districts Hispanics were most frequently represented, in two districts blacks, in one district whites. Most offenders had less than a high school education. As with other findings in this report, in many cases this profile varied by district. Table 1 provides an overview of the offenders in the cases we reviewed. Tables I.6–I.11 in the appendix provide offender data by district.

Table 1: Overview of Offenders[a]

Characteristic		Number of Offenders	Percentage of Offenders[b]
Gender:	Male	516	87
	Female	78	13
Race:	Black	144	24
	White	120	20
	Hispanic	316	53
	Other	14	2
Age:	< 21	17	3
	21 - 30	214	36
	31 - 40	211	35
	41 - 50	120	20
	> 50	33	6
Education:	< High School	301	51
	High School	122	21
	> High School	164	28
HISTORY OF SUBSTANCE ABUSE:	Drugs	145	24
	Alcohol	53	9

[a]No: all attributes could be determined for all offenders.

[b]Percentages do not add due to rounding.

Conclusions

In summary Mr. Chairman, we found that when an offender was convicted under a statute that carried a mandatory minimum sentence, the judge generally imposed at least that sentence.

Offenders in our cases convicted of offenses carrying a mandatory minimum sentence of 60 months received an average of 87 months. For those convicted of 120-month mandatory minimums, the average sentence was 164 months.

The exceptions were cases where the judge granted a departure for substantial assistance. Different district interpretations on what constituted substantial assistance influenced how often substantial assistance departures were requested by the prosecution in individual districts. In some districts we reviewed, the requirements were stringent, in others liberal.

We identified several district prosecutorial policies and practices that influenced whether mandatory minimum charges were pursued against certain categories of offenders. These included a policy not to charge certain drug couriers in one district and district prosecutive thresholds for certain drugs that were higher than the mandatory minimum threshold.

All offenders are to be sentenced under the federal sentencing guidelines. In those cases where the maximum guidelines sentence would be lower than the statutory minimum, the mandatory minimum becomes the guidelines sentence and is the sentence to be imposed. This happened 5 percent of the time for the drug cases we re-

viewed. In approximately 70 percent of the drug cases carrying mandatory minimums sentences that we reviewed, the guidelines sentencing range was longer than the mandatory minimum and consequently was the sentence imposed.

That concludes my statement Mr. Chairman. We would be happy to respond to any questions.

APPENDIX

DISTRICT-SPECIFIC ANALYSIS RESULTS

Table I.1: Substantial Assistance Motions and Departures

District	Defendants Convicted Under Mandatory Minimum Statutes	Substantial Assistance Motions Filed	Offenders Sentenced Below the Mandatory Minimum
EDNY	74	14	14
SDNY	79	17	17
SDFL	155	15	14
SDTX	89	14	11
CDCA	81	8	8
SDCA	52	15	14
NDIL	54	17	9
NEB	11	4	4
Total	595	104	91

Table I.2: Mandatory Minimum Charges Not Pursued

District	Number of Defendants (Total)	Defendants with Mandatory Minimum Charges Not Filed	Defendants with Mandatory Minimum Charges Dropped or Reduced
EDNY	125	72	53
SDNY	25	7	18
SDFL	5	1	4
SDTX	57	7	50
CDCA	15	7	8
SDCA	66	11	55
NDIL	4	0	4
NEB	8	2	6
Overall	305	107	198

Table I.3: Offenders With Mandatory Minimum Charges Dropped/Reduced or Not Filed by Offense Type[a]

District	Drug Charges		Firearms Charges[b]	
	Dropped/ Reduced	Not Filed	Dropped/ Reduced	Not Filed
EDNY	50	68	3	4
SDNY	17	6	1	1
SDFL	4	1	0	0
SDTX	43	1	7	6
CDCA	5	0	3	7
SDCA	50	8	5	3
NDIL	4	0	0	0
NEB	4	2	2	0
Overall	178	86	21	21

[a]An offender may have had more than one charge dropped/reduced or not filed.

[b]Eight offenders with firearms charges dropped/reduced also had drug charges dropped/reduced.

Table I.4: Guidelines Versus Mandatory Minimum Sentences

Drug Offenses Only

District	Total Offenders (Number)	Minimum Guidelines Sentence More Than Mandatory Minimum	Guidelines Sentence Range Included Mandatory Minimum	Maximum Guidelines Sentence Less Than Mandatory Minimum
EDNY	70	46 (66%)	18 (26%)	6 (9%)
SDNY	77	61 (79%)	14 (18%)	2 (3%)
SDFL	155	102 (66%)	46 (30%)	7 (5%)
SDTX	86	60 (70%)	21 (24%)	5 (6%)
CDCA	74	57 (77%)	14 (19%)	3 (4%)
SDCA	49	34 (69%)	11 (22%)	4 (8%)
NDIL	52	36 (69%)	15 (29%)	1 (2%)
NEB	10	6 (60%)	3 (30%)	1 (10%)
Overall	573	403 (70%)	142 (25%)	28 (5%)

Table I.5: Average Sentences for Mandatory Minimum Drug Defendants with No Departure for Substantial Assistance.

District	60-Month Mandatory Minimum Convictions		120-Month Mandatory Minimum Convictions	
	Offenders (Number)	Average Sentence Imposed (Months)	Offenders (Number)	Average Sentence Imposed (Months)
EDNY	41	87	15	130
SDNY	38	83	22	160
SDFL	75	68	58	179
SDTX	49	86	21	167
CDCA	17	86	47	162
SDCA	18	85	16	165
NDIL	25	86	10	177
NEB	2	101	4	190
Overall	265	81	193	167

Table I.6: District Analysis of Offenders By Racial Category

District	Total Number of Offenders	White Offenders	Black Offenders	Hispanic Offenders	Other[a]
EDNY	74	13	20	34	7
SDNY	79	4	28	43	3
SDFL	155	25	28	102	0
SDTX	89	16	6	67	0
CDCA	81	15	37	26	3
SDCA	52	28	3	21	0.
NDIL	54	15	16	23	0
NEB	11	4	6	0	1
Overall	595	120	144	316	14

[a]Other = Native American, Asian, and all others.

Table I.7: District Analysis of Offenders by Gender

District	Total Number of Offenders	Male Offenders	Female Offenders
EDNY	74	68 (92%)	6 (8%)
SDNY	79	73 (92%)	6 (8%)
SDFL	155	125 (81%)	30 (19%)
SDTX[a]	89	81 (91%)	7 (9%)
CDCA	81	65 (80%)	16 (20%)
SDCA	52	47 (90%)	5 (90%)
NDIL	54	46 (85%)	8 (15%)
NEB	11	11 (100%)	0 (0%)
Overall	595	516 (87%)	78 (13%)

[a]Gender could not be determined for one offender.

Table I.8: Offender Criminal History

District	Total Offenders	First Time Offenders	Repeat Offenders		
			Drugs	Gun	Other
EDNY	74	55	5	7	7
SDNY	79	56	14	4	5
SDFL	155	123	21	8	3
SDTX	89	44	20	3	22
CDCA	81	41	13	9	18
SDCA	52	16	11	2	23
NDIL	54	27	17	7	3
NEB	11	3	2	1	5
Overall	595	365	103	41	86

Table I.9: Offender Age

District	Total Offenders (Number)	Age				
		<21	21-30	31-40	41-50	>50
EDNY	74	1 (1%)	26 (35%)	34 (46%)	9 (12%)	4 (5%)
SDNY	79	5 (6%)	35 (44%)	25 (32%)	12 (15%)	2 (3%)
SDFL	155	3 (2%)	43 (30%)	49 (32%)	41 (26%)	19 (12%)
SDTX	89	3 (3%)	36 (28%)	29 (33%)	18 (20%)	3 (3%)
CDCA	81	3 (4%)	30 (37%)	34 (42%)	12 (15%)	2 (3%)
SDCA	52	0	21 (40%)	15 (29%)	14 (27%)	2 (4%)
NDIL	54	2 (4%)	16 (30%)	22 (41%)	13 (24%)	1 (2%)
NEB	11	0	7 (64%)	3 (27%)	1 (9%)	0
Overall	595	17	214	211	120	33

Table I.10: Offender Education Level

District	Offenders (Number)	<High School	High School Graduate	>High School	Don't Know
EDNY	74	36 (49%)	11 (15%)	27 (36%)	0 (0%)
SDNY	79	50 (63%)	11 (14%)	16 (20%)	2 (3%)
SDFL	155	68 (44%)	36 (23%)	50 (32%)	1 (1%)
SDTX	89	54 (61%)	15 (17%)	19 (21%)	1 (1%)
CDCA	81	37 (46%)	21 (26%)	23 (28%)	0 (0%)
SDCA	52	27 (52%)	8 (15%)	14 (27%)	3 (6%)
NDIL	54	26 (48%)	14 (26%)	13 (24%)	1 (2%)
NEB	11	3 (27%)	6 (55%)	2 (18%)	0 (0%)
Overall	595	301 (51%)	122 (21%)	164 (28%)	8 (1%)

Table I.11: Offenders with Indications of Substance Abuse

District	Offenders (Total)	Offenders With Indications Of Drug Abuse	Offenders With Indications Of Alcohol Abuse
EDNY	74	15	5
SDNY	79	31	4
SDFL	155	15	6
SDTX	89	14	7
CDCA	81	29	8
SDCA	52	19	11
NDIL	54	16	9
NEB	11	6	3
Overall	595	145	53

Mr. SCHUMER. Thank you, Mr. Wray. I want to compliment GAO, yourself and your associates. I think you have done an excellent job.

As Mr. Mazzoli has reminded, I think, all of us, if we are going to do something on this we have to do it on the basis of fact. You have provided us with some very important facts.

I would urge all of my colleagues and anybody else who is interested in this issue to look over your charts that just lay out the numbers, which are dry but interesting.

[Laughter.]

Mr. WRAY. Thank you, I think.

Mr. SCHUMER. It is like champagne. Call them the champagne of the GAO—dry but interesting.

Anyway, let me first ask you this question. Did your study indicate that mandatory minimums interfere with the sentencing guidelines? And could you address, as related to that, the point Ms. Stewart brought up and I am sure Judge Wilkins will when he next testifies, that perhaps the—when Congress passed a mandatory they raised the sentencing guidelines to keep the discretion element but at the same time be consonant with the statute that had a mandatory minimum?

Mr. WRAY. Well, as she mentioned and as we found, the mandatory minimum ranges are embedded in the sentencing guidelines. So it is certainly not surprising that the sentences you would get under the guidelines would approximate the mandatory minimums themselves.

In terms of the interplay, the most interesting thing from our point of view is that the mandatory minimums in terms of their length may be harsh and may have adverse effects, but one of the concerns is that the mandatory minimums interfere with the operation of the other factors applied under the guidelines. And based on our analysis we found that that happened in a very limited number of cases. Again, there is a certain circular effect to this. The mandatory minimums are reflected in the guidelines, but then there are a series of mechanisms under the guidelines to justify lesser or greater sentences. There hasn't been, at least based on the cases we reviewed, a substantial interference.

Mr. SCHUMER. Pretty strong disparity, too. If the minimum mandatories were regarded universally by the Sentencing Commission as too high, they obviously could have made the band narrower. I think you said when the minimum mandatory was 120 months the average sentence was 167. I don't remember the numbers.

Mr. WRAY. That was the average that came out after all the factors were——

Mr. SCHUMER. Right. But it is not 122 or 123, but a significant 4 years higher, which is quite a range and buttresses your statement and the belief of many on this committee, myself included, that the two are not out of consonance with one another.

Mr. WRAY. Well, I think we found that the interplay, the additional factors in the guidelines have not been undercut by the mandatory minimums——

Mr. SCHUMER. OK.

Mr. WRAY [continuing]. Although, obviously, the sentence levels in the guidelines were drawn with reference to the minimums.

Mr. SCHUMER. Now, you noted in your testimony that mandatory minimum charging policies and practice varied between districts you studied. Of course it is true, wouldn't you agree, that differences exist with regard to other crimes where there is no mandatory minimum as well, probably to a greater extent, if anything?

Mr. WRAY. Well, presumably. Obviously, there are a lot of factors that go into this beyond mandatory minimums; generally, the law enforcement and prosecutive practices.

Mr. SCHUMER. Right. And you mentioned the Eastern District of New York in which I live, and, of course, which is not a typical district because it has the airports, Kennedy and La Guardia, which have so much drug traffic coming in and coming out. But you indicated they decline to prosecute the mule cases under the statutes carrying the mandatory minimum, and you gave the three reasons. One of them indicated just an overcrowding. That it was just too burdensome. They would be forced to go to trial each time and they didn't have room to do that. The other two were more policy oriented. That perhaps these are the wrong sentence.

Did one outweigh the other two?

Mr. WRAY. No, I really couldn't pinpoint it more. Again, we basically did the case reviews and then conducted some interviews in terms of the policies. But I really don't think I could pin that down anymore.

Mr. SCHUMER. OK. Did your study indicate—and, by the way, I did not make that point in opening statement, but there is another policy issue here which is underlying all of this, and I think we ought to make that clear. Some are—you know, the main thrust in the media of the mandatory minimums, eliminating them or changing them issue, has been the egregious case, which as I have mentioned neither statistically nor evidentiary in terms of the individuals I have found to be preponderant or overwhelming. There are some and I think we should—my judgment is we should try to move with those.

But there is another argument, and that is that for certain types of drug offenses the minimum mandatory might be too high. In other words, perhaps a mule, even a mule carrying—and this is something I would have to think about, we would all have to think about—carrying a significant amount of crack cocaine ought to not get a minimum of 5 years, but maybe a minimum of 2 or 3 years on the theory that it is the people at the top who are running this drug enterprise and they will just find another mule, and maybe that burglar in Mr. Sangmeister's district, I mean we go nuts at our local level—a burglar, I guess I am mixing State and Federal. But other types of criminals should spend more of the composite amount of prison time than these people.

That, however, is a different argument than the huge injustice. To me—I am not going to get on it. It is an argument of resources as opposed to "Oh, this poor mule carrying, you know, 30 tons of—30 kilos of crack got a 5-year sentence?" My heart doesn't go out to that person. It just may be that when there is a limited amount of prison space that person ought to be in jail for 3 years rather

than 5, and somebody who was hitting somebody over the head ought to be in for the 10 years rather than the 7.

Any—that is my own. OK.

Did you find any evidence of racial disparity in the way mandatory minimums are applied?

Mr. WRAY. Well, as I mentioned, we looked at the race——

Mr. SCHUMER. I know you did.

Mr. WRAY [continuing]. In our figures, we don't really have a finding one way or another on that issue. It wouldn't be fair to characterize these——

Mr. SCHUMER. Right.

Mr. WRAY [continuing]. Figures as showing any patterns.

Mr. SCHUMER. OK. Now did you review the Sentencing Commission's report on mandatory minimums? They did a study in 1991.

Mr. WRAY. Yes.

Mr. SCHUMER. OK. You analyzed the methodology in that report, I know. In layman's terms, could you summarize your findings? Were there problems that might limit the usefulness of that report from your accounting point of view?

Mr. WRAY. Well, from our point of view the one difference was they gave, they tended to count more than we did cases where a mandatory minimum would seem to be indicated by the arrest documents but not by the——

Mr. SCHUMER. The preindictment.

Mr. WRAY. Yes, by the preindictment documents. That is one difference. Actually, our findings, I think, are fairly similar in some of these respects. But we just counted cases where a mandatory minimum sentence was not actually charged on the basis that there could have been a number of factors that went into that decision, related to the quality of the evidence and similar factors, that could make that a case where nobody would seek a mandatory minimum if you don't think you can obtain a conviction in the first instance.

Mr. SCHUMER. OK.

Mr. WRAY. But I think beyond that they have made conclusions that we don't have. We are basically not making any conclusions about this.

Mr. SCHUMER. Right.

Mr. WRAY. But in terms of the methodology that was the main difference.

Mr. SCHUMER. Do you want to, Ms. Willis?

Mr. WRAY. Do you want to elaborate on that?

Ms. WILLIS. The major difference was how they treated cases without convictions for mandatory minimums and how we chose to treat them.

Mr. SCHUMER. Would you just elaborate a little on that? They included them in the total statistical base?

Ms. WILLIS. Right. They looked at a universe of cases where the arrest record and other records indicated that there was a mandatory minimum behavior involved and included in their evaluation all of those cases whether there was an actual conviction or not. We chose to take a more conservative approach based on concerns raised by the Justice Department and others that you may not

have been able to obtain a conviction in those cases based on the quality of the evidence and other factors.

Mr. SCHUMER. So, in other words, one could argue that the Sentencing Commission study, they used too broad a universe because they used cases where the mandatory minimum never really bid in because the indictment wasn't done at that phase.

Mr. WRAY. Probably. You have to be very careful with these statistics.

Mr. SCHUMER. Right.

Mr. WRAY. I think probably the actual facts lie in between. I think undoubtedly we have cases where a mandatory minimum wasn't charged because of one of these policies, not because of questions about the quality of the evidence. We just weren't able to pin those down.

Mr. SCHUMER. But aren't there fewer cases where it wouldn't be charged and should have than where it was charged and never was effectuated?

Mr. WRAY. Well, possibly.

Mr. SCHUMER. You don't know.

Mr. WRAY. It is really hard——

Mr. SCHUMER. OK.

Mr. WRAY. It is very hard to say.

Mr. SCHUMER. OK. I understand that. OK, thank you. Again, I want to thank you, Mr. Wray, and Ms. Willis, Ms. Gibson, for your help in this very difficult issue.

Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. Mr. Wray, I would like to go over two areas. I would like to talk about your view of sentencing, mandatory minimum sentencing were imposed, and then where cases are pled or waived by the U.S. attorneys' offices.

From what you saw where mandatory minimum sentences are imposed, the case has already gone to a plea or to a trial, got a conviction, it is my understanding that in the overwhelming majority of cases, I think 95 percent cited by our chairman, your findings are that the sentence imposed under the minimum mandatory guidelines would have been at least imposed by sentencing guidelines had there been no minimum mandatory; is that correct?

Mr. WRAY. Well, in fact, in most of those cases a sentence was a sentencing guidelines sentence rather than a mandatory minimum.

Mr. SCHIFF. Because it was higher.

Mr. WRAY. Yes, that is right.

Mr. SCHIFF. Right. So in other words, sentencing guidelines actually produced a higher sentence than minimum mandatories?

Mr. WRAY. Yes, in most of the cases. Of course, again that is a factor of the base offense levels under the guidelines.

Mr. SCHIFF. Sure. I understand. But it suggests to me that mandatory minimums are not causing great amounts of disparities in sentencing and egregious cases, if the sentencing guidelines would have produced at least that same sentence.

Mr. WRAY. That is right. I think we would say in terms of the process envisioned by the sentencing guidelines, that process has not been preempted by the mandatory minimums, except 5 percent of the cases.

Mr. SCHIFF. I emphasize that because one of the proposals that is out there is a proposal to eliminate mandatory minimum sentences in favor of placing the same sentence over on the sentencing guidelines, and it sounds to me like that wouldn't make that much difference if we actually did that.

Mr. WRAY. That would be one possible remedy that would allow the sentencing guidelines process to work on the additional 5 percent.

Mr. SCHIFF. With the 5 percent.

Mr. WRAY. Yes.

Mr. SCHIFF. The second area I would like to ask you about is where the minimum mandatory sentence is not used because the prosecutor chooses either not to charge the offense or to file a substantial assistance motion under the law. If I understood you correctly, there is at least one district in your study where the drug courier, so to speak, which is a person trafficking in drugs, is not, is routinely not charged, at least not charged under that minimum mandatory statute; is that right?

Mr. WRAY. They generally don't do that. That is right.

Mr. SCHIFF. So that means that in that—I don't remember which district it was.

Mr. WRAY. It is the Eastern District of New York.

Mr. SCHIFF. It is the Eastern District of New York.

Mr. SCHUMER. Brooklyn and Queens, to wit.

[Laughter.]

Mr. SCHIFF. I wasn't being personal, Mr. Chairman, honestly.

Mr. SCHUMER. I haven't had much say on who is appointed there in a long time.

Mr. SCHIFF. I understand. Take it while you have got it.

I want to say, though, but in that district or any other district with that policy that particular minimum mandatory just doesn't exist; is that right? I mean if it is not charged routinely then it never gets into the procedure.

Mr. WRAY. Well, for that particular type of activity. As the general practice, too. I take it they don't necessarily follow that in all cases. It is a general guideline that they have based on resource and other factors.

Mr. SCHIFF. The point I am getting at is really at the other end of the scale here. Where we have a minimum mandatory sentence, and we do in drug trafficking, where one district, the U.S. attorney chooses to charge routinely if they have the evidence, and one jurisdiction the U.S. attorney chooses not to charge it routinely even if they have the evidence, essentially you have a disparity in sentences between those two districts; right?

Mr. WRAY. Well, certainly disparities can result from charging practices.

Mr. SCHIFF. Right.

Mr. WRAY. Under the guidelines and in other contexts. Yes.

Mr. SCHIFF. Sure. In the course of your study, which I think was a 3-year study, did it conclude—may I ask when it concluded?

Mr. WRAY. Well, the data we have go back to late 1990, I think.

Mr. SCHIFF. Does it include any portion of this year also?

Mr. WRAY. No. We don't have any cases from this year.

Mr. SCHIFF. Well, did you determine—does the Justice Department in those years, did it have any policy that you discovered in terms of advising the U.S. attorneys about how to charge when minimum mandatory sentencing is involved?

Mr. WRAY. Well, they had general guidance in the form of a Thornburgh memorandum that dealt with how to charge under the sentencing guidelines, which is the charge—the most serious, readily provable charge in most cases, with some exceptions. There were certain cases where——

Mr. SCHIFF. But you found a whole district that didn't charge, at least as far as couriers go.

Mr. WRAY. Well, in these particular cases, that is right. Now, resource considerations and workload are factors under the Thornburgh memo and they may have been thinking of that in the Eastern District of New York.

Mr. SCHIFF. Well, just to follow up once more on that, did you find any—in the Thornburgh memorandum was reference given to making sure that, or in any way a reference to using more serious offenders to testify against less serious offenders? Did you see that? Because it has come out—if there is any disparity in the three cases you heard earlier, in my judgment, the problem is not by itself sentences for the three individuals involved who, even though you might play it down, first offender, childhood friend, minimal involvement, they have all three voluntarily involved themselves in drug trafficking and knew what that meant.

The disparity is what happened to other offenders who may have been more involved in the same situation but got less of a sentence for, perhaps, testifying against them. Did you find anything in the Thornburgh memorandum that said don't do that? If you have got a more serious offender, don't give that up to make sure you convict the less serious offender. Do you remember that being there?

Mr. WRAY. I don't think that it deals specifically with that issue. Obviously, there are a lot of law enforcement issues that go into the charging decisions.

Again, I should emphasize that our review was done on the basis of looking at statistics in cases. It really wasn't possible for us to talk to the prosecutors in particular cases and really nail down in any individual case what their reasoning was.

Mr. SCHIFF. All right. Mr. Chairman, before yielding back I would just like to conclude that I agree with my colleague, Congressman Mazzoli, that perceived difficulties in charging by prosecutors is not a reason by itself to change the sentencing guidelines, particularly if the difference—with mandatory minimums, if the difference in sentencing guidelines is minimal.

But I don't think we can talk about sentencing policy imposed by Congress without talking about the charging policies of the Justice Department. Again, I would reiterate that I would welcome a hearing with the appropriate Justice Department officials about what their prosecutors are doing with the laws that we give them. And I yield back.

Mr. SCHUMER. Thank you, Mr. Schiff. Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. I would like to return the favor to my colleague from New Mexico. I have written down on the little paper I had your statement earlier today,

which is something to the effect that drug activity is inherently a violent enterprise, and I think we always have to bear that in mind. That when we are talking about drug couriers and first-time this and second-time that we are talking about actors in a violent drama that has consumed assets and resources, both financial and human, in our Nation's cities and townships to the point that some say that we may not ever be the same as a nation. So I think we have to be very careful.

Mr. Wray, let me thank you and your colleagues. GAO once again has given us much food for thought and much information that will help us, because—you may have been in the audience—my steady theme this morning is we need data. We need reliable information about who is doing what to whom, and who is suffering and who is not suffering, and until we have that data we really can't make many judgments.

And in that setting, let me go back over, just briefly, a few things. You studied 900 cases. Something like 595 wound up in the mandatory minimum category. Three hundred and five were cases that were outside the mandatory minimum or they were not pursued, I think is how you say it.

Mr. WRAY. Yes. There was a conviction of a Federal offense but not one carrying a mandatory minimum.

Mr. MAZZOLI. So that is roughly one-third, 305 out of 900. So you are roughly talking about one-third. Because one of the myths that has grown up I think in this, if you are just reading the general material, is that the Federal prosecutors are slavishly devoted to mandatory minimums, and they have got that scourge and they have that sword, and they are just going to go out there and cut somebody's head off every time they have the first opportunity.

Here we have 305 cases where by all indices they could have fit into the mandatory minimum, but either because of substantial assistance or declinations or whatever they wound up outside that category, which I think supports the idea that these are not used slavishly. Is that a fair statement?

Mr. WRAY. Yes. The only point I would make there——

Mr. MAZZOLI. Please.

Mr. WRAY [continuing]. Is the substantial assistance cases would actually come into play when someone was convicted of a mandatory minimum you could still get the substantial assistance——

Mr. MAZZOLI. The declination part would be the——

Mr. WRAY. Right.

Mr. MAZZOLI. And let me get into that for just a moment, because——

Mr. SCHUMER. I would just—if the gentleman would yield?

Mr. MAZZOLI. Yes. Sure.

Mr. SCHUMER. It is a point I made in my opening statement but it is worth reiterating. This deals more with the overcrowding issue and the role that mandatory minimums is playing. But the total number of mandatory minimums in the year that was studied by the Sentencing Commission, there were 38,000 people sentenced under the guidelines and 3,189 were under the guidelines. That is less than 10 percent of all people sentenced.

It is not exactly the point the gentleman was making, but it is an important one when we are being told that the Federal prison

system is just so filled up with people under the mandatory minimums that there is no room for anybody else.

Mr. MAZZOLI. That is a very good point, and I think it also—it indicates that this is a multifaceted problem. It isn't as simple as some might paint it to be.

And I think based on what my colleague, Mr. Conyers, had said earlier, I think it was the gentleman from New Jersey's hearing that I had myself referred to earlier at which we heard from Federal judges and people involved in this situation, and I have a distinct mental recollection, and I will try to bolster it by reading the transcript, where someone at that panel or some of the people said using drug mules, using the Eastern District of New York as a case in point, by saying how terrible it was because some of these drug mules—and I say that they are part of a violent enterprise but this individual more or less—how terrible it was that these people wound up in the slammer for *x* number of years, all they were doing is just acting as the lowest level of this enterprise. They were the bottom rung people.

And, first of all, I think that there is an inherent fallacy in that argument. But beyond that, from what I gathered, for resource issues and proof issues and you name it the U.S. attorneys in the Eastern District of New York have routinely not gone mandatory minimum with respect to these drug mules or couriers. Is that correct?

Mr. WRAY. That is what they told us in interviews. We can't relate that to specific cases. But we were told that was their general policy.

Mr. MAZZOLI. Well, then one of the arguments that was made that day, it seemed to me, in favor of our scrubbing up this thing or maybe eliminating mandatory minimums or doing something along those lines was the fact that the drug mules wound up getting mandatory minimum treatment by these ardent Federal prosecutors because they couldn't give any information. Up the food chain is where you have got people who can get to the kingpin. So, if you were at the bottom rung, you couldn't give them anything, so they put the real heat to you. But if you could give them something, they went easy on you. But these data don't seem to show that, at least for the Eastern District of New York.

Mr. WRAY. Well, for the Eastern District of New York. It might be very different in other districts.

Mr. MAZZOLI. And I think my friend has said that is where a big amount of this activity takes place, coming and going out of J.F.K. and La Guardia.

Mr. SCHUMER. The mules. Very democratic, though.

Mr. MAZZOLI. Very democratic. That is right.

Mr. SCHIFF. If the gentleman would yield for just one second at this point I would appreciate it.

Mr. MAZZOLI. Certainly.

Mr. SCHIFF. It is even worse if there is a downward agreement. In other words, it is even worse if somebody who is here in the chain is given a break to testify to convict someone who is less culpable. It seems to me if they have this person here they should keep that person for the maximum.

I yield back. Thank you.

Mr. MAZZOLI. And I think a couple of points have been borne out. One that there is an awful lot of murky data that we really have to clear up and clarify and delineate. Secondly, there is a lot of myth that has grown up on this subject, and I think a lot of this, I believe, in mandatory minimums stems from the whole idea of sentencing guidelines and the idea that people just don't want to be told what to do in a court setting. They want to have that leeway or discretion which, to some extent, has been deprived by reason of these activities.

And I think it also is borne out that some of the cases, and people just routinely say violent criminals are being released to make room for nonviolent offenders. Well, you know, that is against apple pie and against motherhood and the Fourth of July and everything that America stands for. But we don't really have a lot of numbers to bolster that as an in fact activity.

My last question therefore, Mr. Chairman, to GAO is have you done studies on what I said earlier today about ACIR did with regard to State level prisons? The last question. Have you done studies or can you do studies?

Mr. WRAY. We have done some work along those lines. Actually, we are undertaking a body of work now that looks more broadly at how priorities are set in the law enforcement area and the relationships between State and Federal prosecutions, and the prison population.

Mr. MAZZOLI. Can someone tell me, either GAO or maybe someone in this room, or the Federal Prison Commissions or Bureau of Prisons, how many people in the Federal prisons right now are nonviolent first-time offenders?

Mr. SCHUMER. If the gentleman would yield? I only have the answer for that one year. But I wanted to correct it. That is for nonviolent first-time offenders, the 3,189. And the others who were sentenced under the guidelines might be second-time or violents.

Mr. MAZZOLI. This was a very discrete study. I mean they went into various categories. Now, I have another recollection of the Hughes hearing in which one of the panelists said it is very much more difficult to do that at the Federal level. Why I don't know. But I would love, if you can supply it, or anyone can, the number of nonviolent first-time offenders in the Federal prisons.

Now, I don't understand what Alderson is, whether that is considered a Federal prison or a correctional institution or a halfway house or whatever it is. But what I would like to know is what constitutes a Federal prison, the number of nonviolent first-time offenders, the number of those incarcerated in Federal prisons who are there because of drug-related offenses, the number of those who are serving time for violent crimes, the number of those who have been behind before, in effect are recidivists and multiple offenders, and then this one last category that this ACIR study says is the number of the people who, in this case, are in the fourth time. I mean the ones who have made crime their way of life.

What we need is to know—I go back to it—are violent criminals being released to make room for nonviolent criminals? Are we now putting behind bars forever people who are choirboys, to use the term that Ms. Stewart used earlier? Or in fact, given what we are dealing with, a violent society with a lot of marauding criminals in

it, are we doing a pretty job of discriminating between those who are threats to us and those who are not? I need that information.

Mr. SCHUMER. Do you want to say anything to that, Mr. Wray?

Mr. WRAY. Well, I am not sure how much of that is readily available. We will certainly try to obtain what we can on it.

Mr. SCHUMER. I would just say we have asked the same questions, the subcommittee staff has. I would just say as follows: No. 1, the question how many people in the Federal prison system are nonviolent first-time drug offenders we can't get answer to because until 2 years ago they were not keeping such records. They knew how long they were sentenced for but not the methodology under which their sentence came. For the last 2 years I think it is available and we are trying to get that.

In reference to the second question, it is pretty clear that in the Federal system your statement is not true that nonviolent criminals are bouncing violent criminals out of prison. Whether that is true for certain State systems is a different question that I can't give you an answer on.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. SCHUMER. OK. Thank you, Mr. Wray.

OK. Now we call our third panel, and I want to thank the third panel for their indulgence, as well as the fourth panel, who are going to have to indulge even more. We would ask them to come forward.

Yes, there is a fourth. We are changing the—I am sorry. We are changing the order. Panel 3 will simply consist of former Attorney General Barr and Judge Wilkins. And then panel 4 will be the remaining four witnesses. We would invite either Mr. Wilkins or the former Attorney General to join in in that panel, if they want to, because we thought the last panel would be a little more of a discussion group. Although, frankly, we have plenty of back and forth discussion even up to this point, which I think is good.

OK. Then let me introduce the Honorable William Wilkins. He is the Chairman of the U.S. Sentencing Commission, and U.S. circuit judge for the Fourth Circuit Court of Appeals. Before taking his current position, Judge Wilkins served as a U.S. district court judge for the District of South Carolina.

The Honorable William Barr served as Attorney General—we all know him well on this committee and subcommittee—of the United States under the Bush administration, and he is now a partner with Shaw, Pittman, Potts & Trowbridge in Washington, DC. And before becoming Attorney General, Mr. Barr served as Deputy Attorney General.

Judge Wilkins, you may begin.

STATEMENT OF JUDGE WILLIAM W. WILKINS, JR., CHAIRMAN, U.S. SENTENCING COMMISSION

Judge WILKINS. Thank you, Mr. Chairman. First of all, I would like to submit, if I may, for the record a factsheet that profiles drug offenders sentenced in the Federal courts in the year 1992. You may find it informative.

Mr. SCHUMER. Please. And, without objection, it will be entered into the record.

Judge WILKINS. Thank you very much. I also have for the record a legislative proposal that I would like to discuss with you. And if I may I would like to submit that for the record.

Mr. SCHUMER. Without objection, that too will be submitted for the record.

Judge WILKINS. Thank you very much. I have just a few brief remarks. My written testimony has been submitted.

First of all, let me say that whatever concerns people may have with mandatory minimum provisions, there is no support from this witness and no support from the U.S. Sentencing Commission that we should retreat from the principle that criminal acts should be met with tough and with certain sentences.

Today, there exists a congressionally chartered sentencing system—that is, the Federal sentencing guidelines—that assure tough and certain punishment. Indeed, this type of system and these punishments would continue even if for some reason the mandatory minimums were to disappear today and be taken from the books or substantially modified.

For example, of all defendants—and I think you have referred to this in earlier testimony—of all defendants subject to the 5-year mandatory minimum penalty—that is, the 60-month mandatory minimum—the average sentence for these defendants is not 60 months but, under the guidelines 88 months. Those defendants who are facing the 10-year mandatory minimum penalties—that is, 120 months—the average sentence is not 120 months but, actually 197 months. Of course, this is because the Congress, by passing mandatory minimum statutes, essentially sets the starting point or base offense level for these type of offenses under the Federal sentencing guidelines. Then, if aggravating factors are present in a given case, the guidelines will enhance the sentence.

A defendant facing a 10-year mandatory minimum penalty who has no aggravating factors will receive 120 months imprisonment. But those who have aggravating factors, such as the use of a weapon or violence, or recidivists with long criminal records and so forth, under the guidelines scheme, those sentences will, of course, be increased.

Importantly, Congress should not be distracted by off-the-mark suggestions that this is an issue of being tough or being soft on crime. I am a former prosecutor and I chair an agency where crime control is the primary goal that we have attempted to achieve. I firmly believe that to effectively control crime we must have a sentencing system that deals from a position of strength. So I put to you what I believe is the real question that we should consider: What is the most efficient, the most effective and the fairest sentencing system that we can devise?

The old system of sentencing that you talked about, Mr. Chairman, the unbridled discretion of Federal judges that we enjoyed at one time in relatively recent history, and then with the sentencing mandatory minimum scheme, if we only had those two choices I would testify keep the mandatory minimum sentencing scheme in place. But fortunately, we do not and are not limited to that choice, for there is a choice that I would like to suggest to you today.

So I believe the solution will lie to this, to the problem, and there are some problems with mandatory minimums I will be glad to dis-

cuss. They have many positive aspects, but they have some negative aspects as well. The solution lies in legislation that will promote greater coordination between the mandatory minimum sentencing scheme and the Federal sentencing guidelines scheme. I propose for Congress' consideration legislation that would, I think, look at both of these two sentencing schemes and then have them both apply in a more systematic, more logical and rational basis.

This is what this legislation would call for, briefly. First of all, the bill would not repeal—with due respect to Mr. Edwards—would not repeal mandatory minimum provisions now on the book. Rather, it would use them as starting points with directions to the U.S. Sentencing Commission to start its sentencing system off. This approach would have the effect of Congress setting the sentence for the typical offender, the average offender, the one who has no aggravating factors present and no mitigating factors present, allowing the guidelines which recognize these other important factors of sentencing to take over.

Congress has a vital, and has played a vital role, in setting national sentencing policy. This legislation, I believe, will fully accommodate the role that Congress shall continue to play in setting national sentencing policy.

Second of all, this bill would say that aggravating factors recognized by the guidelines and recognized by law today; that is, use of a weapon or a leadership role in the offense, obstruction of justice, injury to a victim, and others would continue to apply. This means that when aggravating factors were present, and proven by the Government to the satisfaction of the greater weight of the evidence as found by the district court, the guidelines would require a sentence greater, often substantially greater, than the mandatory minimum sentence.

Third, in the case in which mitigating factors recognized by the guidelines, and recognized by law today; that is, a defendant's minor role in the offense or acceptance of the responsibility of the criminal act, were applicable, then this proposed legislation would allow the guideline provisions to operate for a proportionate reduction in the sentence, to accounting for the presence of the mitigating factor.

Mr. SCHUMER. Judge, I am sorry to interrupt you.

Judge WILKINS. Yes, sir.

Mr. SCHUMER. How much would proportionate be?

Judge WILKINS. Well, I can tell you now, and this works in guidelines every day without the operation of mandatories——

Mr. SCHUMER. I think that is an important question for all of us.

Judge WILKINS. Let me give you an example. Let's take a drug conspiracy. It has the leader, it has three average participants, and it has one errand boy, a real minor participant. They are all convicted of the same statute of conspiracy to possess for distribution purposes 5 or more kilograms of cocaine. They are all looking at the 10-year mandatory.

Under the guidelines, the leader of this conspiracy would receive a sentence of about 16 years, as opposed to the mandatory minimum 10-year sentence. The three average participants who had no aggravating or mitigating role, would receive 10 years, because that is the mandatory provision. The minor participant, assuming

this minor participant accepted responsibility—that is, offered a timely plea of guilty to the Government and cooperated with the Government, not in the prosecution of others but just in his own case, that plus the minor role would reduce that person's sentence down to approximately 5 years. So you would have the kingpin at about 15 to 16 years, the middle level participants, the average participants at the mandatory minimum, and this minor participant at 5 years.

I am glad you asked me that because when I talk about a proportionate reduction no one is suggesting that these minor participants in major drug conspiracies should not go to prison. They should go to prison. The question is how much? Where does crime control reach—when do we achieve crime control? How do we efficiently use our resources? Are we really contributing to crime control or are we fighting the drug war by placing minor participants in prison for extended periods of time when a 5- or 6-year sentence could serve the same purpose?

I might add too that there are only these two mitigating factors—acceptance of responsibility and role in the offense—that are ever recognized by the guidelines in drug offenses. They are structured, they are confined, and judges, when they do apply these mitigation factors, apply them because the facts dictate their application. And, of course, the judge is cabined by the guidelines so the reduction is limited.

I will say this, though. This proposed legislation, as in all other cases, provides that in the unusual case the judge can depart below the guidelines by stating a justifiable reason on the record and then sentencing accordingly. This is the safety valve of the Sentencing Reform Act that applies to all cases, not just drug cases. But, of course, it doesn't apply when a mandatory minimum applies. So, regardless of the mitigating circumstances the judge cannot take those into account.

I would not be alarmed by giving judges that departure authority. They exercise it only in 6 percent of the cases. Moreover, the Government has the right of appellate review in case the judge does something that the Government disagrees with.

In my view, this proposal not only alleviates the structural problems with mandatory minimums, but it also has two important additional benefits. First, it would increase fairness and proportionality in sentencing. One of the major problems with mandatories is that they lack proportionality in sentencing. A mandatory minimum is a flat tariff. Regardless of the facts, regardless of the aggravating factors or mitigating factors, mandatory minimum penalties apply across the board.

My proposal would meet these objectives by providing sentencing adjustments under the mandatory Federal sentencing guideline regime. This means that appropriate adjustments for mitigating factors would occur in a certain and predictable fashion.

Second, by using guideline mitigating factors, which have now been construed by the courts, this approach would not add a further tier of complexity to the current sentencing system. Indeed, my proposal would ease current complexities by making mandatory minimums and the guidelines function in an integrated fashion.

I believe that what is needed is this type of corrective legislation, which would allow us—that is, us, the Congress and the American people—to maintain the core principles of mandatory minimums and provide certain and significant punishment, but not sacrifice proportionality and consistency in punishment at the same time. Integrating mandatory minimums in the guidelines system, I think, would accomplish these twin objectives, and would also do it in a manner that would increase the efficiency of our current, sometimes fragmented, two-tiered sentencing system.

Thank you very much, Mr. Chairman.

[The prepared statement of Judge Wilkins follows:]

PREPARED STATEMENT OF JUDGE WILLIAM W. WILKINS, JR., CHAIRMAN, U.S. SENTENCING COMMISSION

INTRODUCTION

Mr. Chairman, members of the subcommittee, my name is William W. Wilkins, Jr. I am a judge on the United States Court of Appeals for the Fourth Circuit and Chairman of the United States Sentencing Commission. I appreciate the opportunity to appear before the subcommittee today.

Today's hearing offers a rare opportunity. It is the first congressional hearing devoted to the important topic of mandatory minimums in nearly a quarter century. The last time hearings of this kind occurred, they laid the groundwork for Congress' decision to repeal an array of mandatory minimums then on the books. In some ways, it seems we have come full circle. Congress adopted drug mandatory minimums in 1956, repealed them in 1970, enacted more in the 1980's, and is being asked to reconsider their wisdom again today.

There are critical differences between 1970, the year mandatory minimums were last repealed, and today, however. First of all, whatever concerns people may have with respect to mandatory minimums today, there is no support from this witness or from the Sentencing Commission as a whole for retreating from the principle that serious crime should be met with tough and certain punishment.

Unlike the case in 1970, today there exists a congressionally chartered sentencing system—the federal sentencing guidelines—that already assures tough and certain punishment for serious offenses and would continue to do so even if mandatory minimums disappeared tomorrow or were substantially modified. This difference between 1970 and today strikes me as highly relevant to your deliberations.

On the other hand, what is similar about 1970 and the events of today is the growing view among close observers of the federal sentencing system that reform of mandatory minimum laws is needed. The conference of every circuit with criminal jurisdiction[1] in the federal judicial system, the Judicial Conference as a whole, the U.S. Sentencing Commission, prosecutors and defense attorneys, federal corrections experts, as well as such prominent individuals as Attorney General Reno and Chief Justice Rehnquist, have all spoken of their concerns in this area.

It is important to note this developing consensus because we occasionally hear the comment that criticisms of mandatory minimums should be dismissed as coming from judges who are unhappy about limits on their discretion. This viewpoint is, I believe, shortsighted and superficial. True, mandatory minimums limit the discretion of sentencing judges, but among the overwhelming majority of judges who have come to question the wisdom of mandatory minimums are federal appellate judges, whose discretion is not affected, and substantial numbers of district judges who support the federal sentencing guidelines, which are mandatory and limit judicial sentencing discretion more comprehensively than mandatory minimums. Moreover, as I have indicated, the spectrum of viewpoints represented by those who have concerns about mandatory minimums is far broader than the federal judiciary. It includes representatives of virtually all sectors in the criminal justice system. So, Congress should not be led to believe that the concerns being raised derive from some narrow or parochial interest.

Importantly, Congress should not be distracted by off-the-mark suggestions that this is a soft vs. tough on crime issue. I am a former prosecutor and I chair an agency that views *Crime Control* as the most important goal of sentencing. I firmly believe that to effectively control crime our federal criminal justice system must deal

[1] The Federal Circuit does not have criminal jurisdiction.

from strength. So the real issue is how to most effectively, efficiently, and fairly, achieve this important goal.

We should first ask whether mandatory minimums are, on balance, doing what they are intended to do: do they contribute to or detract from the goal of achieving a highly effective federal sentencing system.

For reasons I will detail, I think two conclusions are now clear. First, mandatory minimums are in fact undercutting effective sentencing policy rather than promoting it. Second, the solution to this problem lies not in the abandonment of meaningful and certain punishment, which mandatory minimums are intended to require, but rather in greater coordination between mandatory minimums and the other congressionally chartered approach to mandatory sentencing policy, the federal sentencing guidelines.

In my remaining time, let me briefly outline what I see as the four principal drawbacks of mandatory minimums, explain why I think so-called "safety valve" approaches will not address these problems, and offer a proposal that I think will.

I. The Principal Drawbacks of Mandatory Minimums

In its 1990 omnibus crime bill, Congress directed the Sentencing Commission to submit a comprehensive report on mandatory minimum penalties. That report,[2] which contained exhaustive legal, empirical, and policy-related analyses, identified four principal problems with mandatory minimums.

Problem One: Mandatory Minimums Create Unwarranted "Cliffs"

Mandatory minimums often create what can be called "cliffs" in punishment. What this means is that relatively minor and sometimes inconsequential differences in the facts of a case can have a huge impact on the sentence. To cite one example, a defendant who possesses 5 grams of crack *can be sentenced to no more than one year in prison.* But a defendant who possesses even a hundredth of a gram more than that *must be sentenced to 5 years in prison.* So, a minute difference in the amount of crack involved requires at least a four-year difference in the amount of prison time to be served. Can we really defend as rational sentencing policy a law that makes four years of a person's life (and tens of thousands of taxpayer dollars) turn on such an insignificant difference in drug quantity. The sharp "cliffs" associated with many of the mandatory minimums simply do not square with a sentencing policy that is fair, equitable, and avoids unwarranted disparity among otherwise similar defendants.

Problem Two: Mandatory Minimums Generate Similar Sentences for Offenders Who Significantly Differ in Seriousness

A second recurring problem with mandatory minimums is that they treat similarly offenders who can be quite different with respect to the seriousness of their conduct or their danger to society. This happens because mandatory minimums generally take account of only one or two out of an array of potentially important offense or offender-related facts. In the drug area, mandatory minimum penalties are generally only concerned with the quantity of drugs involved. Thus, the same 5-, 10- or 20-year mandatory minimum applies whether the defendant was the kingpin who organized and ran the drug conspiracy, whether the defendant was the average or typical offender, or a bit player who, for a few hundred dollars, helped off-load the boat or played some other minor role in the offense. Definitions that trigger the application of mandatory minimums are often so broad that they sweep in very different kinds of offenders. For example, the serious-sounding term "crime of violence," on which some mandatory minimums rely, includes everything from premeditated murder to vandalizing a mailbox. The bottom line is that mandatory minimums tend to impose sentence uniformity when sound policy calls for reasonable differences in punishment.

Problem Three: Mandatory Minimums Do Not Promote Certainty in Sentencing

A key objective of mandatory minimums is to foster certainty in punishment. The Sentencing Commission's analysis of over one thousand actual cases found that, in fact, mandatory minimums undercut certainty in sentencing.

> Overall, the study found that of defendants who engaged in behavior for which a mandatory minimum appeared applicable, 40 percent *were sentenced below the applicable penalty.*

[2] U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991).

Of drug defendants who appeared to warrant a mandatory sentence enhancement due to the presence of a weapon, *no weapon charge was filed in 45 percent of the cases.*

Of defendants for whom increased mandatory minimum penalties appeared applicable due to prior felony convictions, *the increased penalty was not sought or obtained 63 percent of the time.*

In short, far from fostering certainty in punishment, mandatory minimums result in unwarranted sentencing disparity. One reason this occurs is that the application of mandatory minimums frequently depends on the subjective charging decisions of individual prosecutors. One prosecutor may think—and perhaps reasonably—that a full mandatory minimum sentence is just too harsh for a minor player in a drug conspiracy and not seek the mandatory sentence, while another, with the identical case, will handle it strictly by the statute. The point is that mandatory minimums often allow the subjective views of individual prosecutors to set the sentence and this both undercuts the certainty of sentencing and leads to measurable, unjustified sentencing disparity.

Much has been said and written in the last several years about how current sentencing policies shift discretion from judges to prosecutors. To the extent these concerns are directed at the sentencing guidelines, they fail to take into account the multiple features built into the guideline system to keep the judge in control of sentencing—albeit with cabined discretion—and to ensure that the sentence will be based on the facts of the case rather than the prosecutor's charge. When it comes to many of the mandatory minimums, however, the prosecutor can often dictate the sentence, and there is little the Commission can do to mitigate this transfer of sentencing authority from judge to prosecutor.

PROBLEM FOUR: MANDATORY MINIMUMS FREQUENTLY INTERFERE WITH THE GUIDELINES ABILITY TO WORK EFFECTIVELY

In 1984 Congress passed the Sentencing Reform Act. This landmark legislation reflected an enormous amount of legislative deliberation and thought. Through detailed enabling legislation (and accompanying legislative history), the Act abolished parole and called for the creation of the Sentencing Commission to write mandatory sentencing guidelines. The guidelines have been in operation since 1987. Evaluations by the Sentencing Commission and the Government Accounting Office found that the guidelines are sound and working. Nevertheless, the Commission constantly monitors and refines them as necessary. The guidelines were written to accommodate mandatory minimum penalty provisions to the extent possible, but many times the guidelines and mandatory minimums simply are at odds with each other.

This is unfortunate because the guidelines have, as Congress specifically provided for, been designed to avoid the other three problems with mandatory minimums that I just identified:

The guidelines do not cause cliffs in sentencing because they *incrementally* increase punishment in light of aggravating facts demonstrating the need for increased punishment, whether those facts be a more serious prior record, an aggravating role in the offense, an obstruction of justice, etc.

The guidelines do not lump together offenders who differ in seriousness because they are *sensitive to facts* that justify differences in sentences. Thus, under the guidelines, the leader of a drug trafficking conspiracy will receive a prison sentence about 50 percent longer than one of his typical subordinates, and about twice as long as an underling with only a minimal role in the offense.

The guidelines foster certainty in punishment because guideline sentences depend far more on *the actual facts of the case,* as found on the record by a judge, than on the subjective charging decision of a particular prosecutor. Thus, the guidelines require a proportionate increase in the sentence of a drug trafficker if that trafficker carried a gun during the offense. This will occur whether or not the prosecutor charges the mandatory minimum statute that requires a flat, five-year increase for weapon involvement.

Yet as the guidelines seek to avoid the very kinds of problems mandatory minimums cause, mandatory minimums often block their ability to do so. The law requires that mandatory minimums control when they differ from the guidelines. So, in precisely the areas where mandatory minimums could benefit from the rational and effective attributes of the guidelines, the law stands sound policy on its head: instead of the guidelines operating to ameliorate the inherent, structurally induced

problems of mandatory minimums, the mandatory minimums render inoperative the ameliorative effects of the guidelines.[3]

II. "Safety Valve" Proposals

Some have suggested that the solution to the concerns mandatory minimums raise is to leave the mandatory minimums in place but carve out, through a so-called "safety valve," a category of offenders who would not be subject to their penalties. There are two troubling flaws with this kind of approach. First, safety valves would add more complexity to an already unnecessarily complex sentencing system. Today we have the mandatory minimum sentencing system built on top of the guidelines system—each system with its own structure and rules of application. Safety valves would add a third layer of complexity. Judges would have to sort out which offenders are subject to which set of penalties, and because the stakes could be a difference of many years in prison, this third tier of sentencing law would likely add resource costs to our criminal justice system in the form of increased litigation, court time, and sentencing disparity as courts grappled with the conflicting sets of rules.

The second problem with safety valves is that they would leave largely intact the four problems I noted that mandatory minimums cause. Indeed, the problem of cliffs could become even more pronounced. Those falling into the safety valve category could expect more lenient sentences—perhaps substantially more lenient—depending on the view of the sentencing judge while those whose offense or offender characteristics *differed only sightly* would receive a far harsher penalty. Again, a small factual difference could cause a substantial difference in punishment.

Moreover, under some safety valve proposals, cliffs could result from highly artificial criteria. For example, under some proposals a prior felony drug conviction would disqualify an offender for consideration for safety valve treatment. Prior record is an important sentencing consideration, but whether an offender had a prior felony drug conviction is not, by itself, a dependable criterion on which to base substantial swings in punishment. To illustrate, prosecutors have historically entered into plea bargains to give breaks, for example, to lower-level players in drug conspiracies. Take the example of two defendants who committed the same drug offense and both were sentenced to six months in prison. In one case the prosecutor agreed to accept a plea to a misdemeanor from offender #1. Another prosecutor, with essentially the same leniency goal in mind, agreed to a sentence bargain calling for the defendant to plead guilty to a felony charge in exchange for a recommendation (or binding agreement) of six months in prison. This is a typical example of two prosecutors faced with similar offenders, both seeking to achieve a desired sentence but using different avenues to do so. Under a safety valve approach, with its simplistic reliance on whether the prior offense to which the defendant pleaded was a felony drug conviction, the nature of the prosecutor's deal—not the actual seriousness of the prior offense—could translate into a difference of five, ten, or even more years in prison for the subsequent offense. And, importantly, in addition to the federal courts, there are 50 state jurisdiction where criminal records are established, jurisdictions that do not follow federal sentencing guidelines and use widely varying plea bargaining and charging practices.

Some safety valve proposals compound these kinds of problems by making the safety valve a discretionary option with the judge. Discretionary safety valves under which the judge would use his or her own subjective judgment about whether and how much to reduce the sentence would undercut sentence certainty and reintroduce unwarranted disparity the Sentencing Reform Act and the sentencing guidelines were designed to reduce.

In sum, safety valves would exacerbate the complexities of an already complex system, would fail to address the structurally inherent problems of mandatory minimums, and could foster unwarranted disparity.

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[3] For example, the Commission designed the drug trafficking guidelines so that a typical, first offender who deals in a quantity of drugs corresponding to a mandatory minimum will receive a guideline sentence at or above the statutory minimum. But, then the guidelines provide an array of aggravating factors to boost sentences higher for more serious drug offenses. They also provide several important factors that most people agree should generally result in lower sentences—principally reductions for a less culpable role and for a defendant's acceptance of responsibility for the offense. In many cases, however, the presence of these mitigating factors has absolutely no effect on the sentence because of the mandatory minimum.

III. A Proposal To Bring About Greater Coordination Between Mandatory Minimums and the Guidelines

I propose for Congress' consideration legislation that would address concerns over mandatory minimums for drug offenses in what I believe is a more systematic and rationally defensible manner. Overall, this proposal would achieve its results by bringing about greater coordination between mandatory minimums and the sentencing guidelines. The proposal I have put forward is supported in principle by the members of the Sentencing Commission, the Criminal Law Committee of the Judicial Conference, and many others.

Briefly, the legislation has these features:

First, recognizing Congress' special concern regarding gun-related offenses, the bill would have no impact on mandatory minimums for firearms. Although sound policy arguments can certainly support expansion of the bill's general approach, it affects only drug-related mandatory minimums.

Second, the bill would not repeal current mandatory minimums. Rather, it would use them as statutorily set starting points for guideline offense levels. This approach would have the effect of Congress setting the sentence in typical cases in which no aggravating or mitigating factors recognized by the guidelines were applicable. Congress has a vital role to play in setting national sentencing policy, and this proposal fully accommodates that role.

Third, all guideline aggravating factors—such as use of a weapon, a leadership role in the offense, obstruction of justice, injury to a victim, etc.—would continue to apply as is the case today. This means that when aggravating factors were present, the resulting guideline sentence would be greater—often substantially greater—than the mandatory minimum. I believe this facet of the proposal meets squarely the American public's rightful concern that serious crime be answered with tough and sure punishment.

Fourth, in cases in which mitigating factors recognized by the guidelines—such as a defendant's minor role in the offense or acceptance of responsibility—were applicable, the guidelines' provisions for a proportionate reduction in the sentence to account for such factors would be permitted in order to draw distinctions between more and less serious offenders. This facet of the proposal ensures that while punishment will always be tough it will also always be fair by recognition of the important principles of proportionality. This does not mean that a minor participant in a drug conspiracy would not go to prison. What it does mean is that because of the existence of a mitigating factor, the sentence would be somewhat less than the sentence for a co-defendant who did not exhibit the mitigating factor.

Fifth, in unusual cases with truly compelling circumstances—which 1992 sentencing data indicate occurs about six percent of the time—courts would be permitted to depart below the guideline range according to well-established statutory and case law criteria. The government would maintain its right to appeal any such departure to ensure it met these criteria.

Finally, to further develop sound sentencing policy with respect to first offenders, the bill directs the Sentencing Commission to work closely with the Department of Justice and others to identify additional sentencing options that would be submitted to Congress for your consideration and approval.

In my view, this proposal would not only alleviate structural problems with mandatory minimums, it would have two important additional benefits. As with all mandatory minimum reform proposals, the bill would seek to increase fairness and proportionality in sentencing. But in contrast to other proposals, the bill would meet these objectives by providing sentencing adjustments under the mandatory federal sentencing guidelines regime. This means that appropriate adjustments for mitigating factors would not be left to unguided discretion, but rather would occur in a certain and predictable fashion. Second, by using guideline mitigation factors, which have been already construed by the courts, the approach would not add further complexity to the current sentencing system, and indeed would ease current complexities by making mandatory minimums and the guidelines function in an integrated manner.

Conclusion

In 1984, before it passed the Sentencing Reform Act establishing a regime of sentencing guidelines, Congress examined the highly discretionary sentencing system then in place and concluded that it was haphazard, unfair, and at times provided results that were disproportionate to the seriousness of the offense. Congress determined that sentencing system that operates in such a fashion "creat[es] disrespect

for the law."[4] Mr. Chairman, I believe it is time to recognize that the outcry we have recently heard over mandatory minimums is also due to the fact that they are, with disturbing frequency, operating in a haphazard, unfair, and disproportionate manner and as a consequence are undercutting respect for the law. The importance of maintaining the credibility of federal criminal enforcement is simply too great to allow this to happen.

I believe that what is needed is corrective legislation that would, on the one hand, maintain the core precepts of mandatory minimums, namely that there be certain and significant punishment, but on the other hand, would assure that proportionality and consistency in punishment are not sacrificed. Integrating mandatory minimums and the guidelines along the lines of this proposal would, I believe, not only accomplish these twin objectives, but would do so in a manner that would significantly increase the efficiency of our current, somewhat fragmented, two-tier sentencing system.

Mr. Chairman, I commend you for convening this hearing on this very important topic. I appreciate the opportunity to appear here today. The Commission looks forward, as always, to working with you on this and other important matters in the months ahead. Thank you.

Section-by-Section Analysis

1. Section 1 cites the title of the legislation as the "Controlled Substance Minimum Penalty-Sentencing Guideline Reconciliation Act of 1993."

2. Section 2 instructs the Sentencing Commission to establish minimum offense levels under Chapter Two of the sentencing guidelines for the most frequently prosecuted controlled substance offenses that presently are subject to statutory minimum penalties.

The directive correlates the drug quantities and existing statutory minimum sentence of five years with a Chapter Two guideline offense level of not less than level 24. Similarly, the drug quantities and statutory minimum sentence of ten years are correlated with an offense level of not less than 30. For offenses in which death or serious bodily injury results from use of the controlled substance, the 20-year statutory minimum is correlated with an offense level of 38. Finally, for offenses involving the simple possession of more than five grams of crack, the existing five-year statutory minimum is correlated with an offense level of 24. In each case, the offense levels chosen are those that, in the absence of any mitigating or aggravating factors recognized under the guidelines, would produce a guideline range that contains the existing statutory minimum sentences.

In the case of the five- and ten-year statutory minimum sentences, the minimum offense levels designated in the statutory directive to the commission are each two levels lower than those presently used in the sentencing guidelines. When initially promulgating the guidelines for drug trafficking offenses, the Commission felt compelled to use minimum offense levels equating to sentencing ranges with a lower limit that was above the applicable statutory minimum sentence. The proposed statutory directive would permit the Commission to effect a modest reduction in offense levels, but the resulting guideline ranges applicable to first offenders subject to no aggravating or mitigating factors under the guidelines would still accommodate the statutory minimum sentences.

3. Section 3 of the bill reconciles the operation of the sentencing guidelines with the statutory minimum sentences contained in sections 841(b), 844(a), and 960(b) of title 21, United States Code. These are the minimum sentences presently applicable to drug trafficking offenses and the simple possession of more than five grams of crack. The bill does not repeal these statutory minimum penalties. It retains them for the purpose of establishing, pursuant to specific statutory directives to the Sentencing Commission, base penalties under the sentencing guidelines for typical cases involving drug quantities that correlate with the statutory minimums. The existing statutory ban on probation also would be retained.

Nevertheless, the legislation language would permit the guidelines to operate unimpeded by the Statutory minimums; i.e., any pertinent aggravating or mitigating provision under the guidelines that is applicable to the defendant under the facts of the case would adjust the guideline range above or below the statutory minimum sentence. The court would then impose a sentence within the guideline range. Additionally, if no aggravating or mitigating factors applied, the court could sentence at any point within the guideline range that incorporates the otherwise applicable statutory minimum sentence, even if the chosen sentence was lower than the otherwise applicable statutory minimum. Furthermore, if a basis for sentencing out-

[4] S. Rep. No. 225, 98th Cong., 1st Sess. 46 (1983).

side the guideline range (i.e., departure) existed under the applicable statute (i.e., 18 U.S.C. § 3553(b)), pertinent provisions of the guidelines and policy statements, and relevant case law, the court in its discretion could impose a departure sentence. For example, a mother of a child born with AIDS who, for a fee of $2,000, agrees to act as a heroin courier on one occasion to get money to pay for her child's treatment, could receive a sentence below the guideline minimum.

4. Section 4 of the bill allows the reconciliation of the guidelines and statutory minimum sentences to have a limited retroactive effect, notwithstanding the provisions of 1 U.S.C. § 109.

First it would allow the provisions of section 3 to be applied after they take effect to any case not yet sentenced.

Second, it would permit the provisions of section 3 to apply to any reconsideration of sentence authorized by the Commission under 18 U.S.C. § 3582(c)(2).

Application of the sentencing policy changes to cases previously sentenced presents a number of practical problems that would need to be addressed in order for this procedure to be feasible. The Commission will continue to discuss these issues with representatives of the various components of the criminal justice system in an effort to find a reasonable means to achieve this objective.

5. Section 5 of the bill allows the Commission reasonable flexibility to implement any specific statutory directive in a manner most consistent with the sentencing guidelines as a whole.

It also provides the Commission with a general grant of authority to effect changes in guidelines that initially are constructed in fulfillment of a specific statutory directive. When any such changes are made, the provision requires that the Commission highlight and explain the modifications so that Congress can specifically consider their advisability.

Experience has shown a need for such flexibility in light of changing circumstances. For example, many believe that the guideline applicable to career offenders, which the Commission promulgated pursuant to a specific directive in the Sentencing Reform Act (28 U.S.C. § 994 (h)), should be revisited. with the flexibility afforded by this change, the Commission would have the latitude to modify the guideline without a specific amendment to the statute.

6. Section 6 requires the Commission to conduct a study and report to Congress within 6 months on sentencing practices as they relate to first-offender, non-violent defendants convicted of drug offenses. Congress and the Commission would then be in a more informed position to consider further changes in sentencing policy that may be appropriate for such offenders.

DRAFT
June 11, 1993

103rd Congress
1st Session

AN ACT

SECTION 1. This Act may be cited as the "Controlled Substance Minimum Penalty-Sentencing Guideline Reconciliation Act of 1993."

SEC. 2. Directive to the Sentencing Commission Regarding Amendments to the Sentencing Guidelines for Controlled Substance Offenses.

(a) Within sixty days of the date of enactment of this Act, the United States Sentencing Commission shall amend the sentencing guidelines as necessary to ensure that the Chapter Two offense level applicable to --

(1) a defendant whose offense involved a type and quantity of controlled substance set forth in section 841(b)(1)(A) or 960(b)(1) of title 21, United States Code, is not less than level 30;

(2) a defendant whose offense involved a type and quantity of controlled substance set forth in section 841(b)(1)(B) or 960(b)(2) of title 21, United States Code, is not less than level 24;

(3) a defendant subject to an enhanced penalty under section 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 960(b)(1), 960(b)(2), or 960(b)(3) of title 21, United States Code, for an offense resulting in death or serious bodily injury from the use of the controlled substance, is not less than level 38.

(4) a defendant subject to a minimum sentence of five years under section 844(a) of title 21, United States Code, for the possession of cocaine base, is not less than level 24.

(b) The Commission may make such additional amendments as it deems necessary and appropriate to harmonize the sentencing guidelines and policy statements to any amendments promulgated pursuant to subsection (a).

(c) The provisions of section 994(x) of title 28, United States Code, shall not apply to the promulgation of amendments under this section.

(d) The amendments to the sentencing guidelines promulgated by the Sentencing Commission pursuant to this section shall take effect sixty days following the date of enactment of this Act.

SEC. 3. Interaction of Minimum Penalties with Sentencing Guidelines.

(a) Section 401 of the Controlled Substances Act (21 U.S.C. § 841) is amended by inserting the following new subsection following subsection (b):

"**Interaction of minimum penalties with sentencing guidelines**

(c) Notwithstanding the minimum penalties set forth in subsection (b),–

(1) the court shall impose a sentence within the applicable sentencing guideline range, or

(2) if the court determines, in accordance with section 3553(b) of title 18, United States Code, and any pertinent policy statement issued by the Sentencing Commission, that a sentence outside the guideline range is warranted, the court may impose such a sentence.".

(b) Section 1010 of the Controlled Substances Import and Export Act (21 U.S.C. § 960) is amended by inserting the following new subsection following subsection (b):

"Interaction of minimum penalties with sentencing guidelines

(c) Notwithstanding the minimum penalties set forth in subsection (b),--

(1) the court shall impose a sentence within the applicable sentencing guideline range, or

(2) if the court determines, in accordance with section 3553(b) of title 18, United States Code, and any pertinent policy statement issued by the Sentencing Commission, that a sentence outside the guideline range is warranted, the court may impose such a sentence.".

(c) Section 404 of the Controlled Substances Act (21 U.S.C. § 844) is amended by inserting the following new subsection following subsection (a):

"(b) Notwithstanding the five year minimum penalty set forth in subsection (a),--

(1) the court shall impose a sentence within the applicable sentencing guideline range, or

(2) if the court determines, in accordance with section 3553(b) of title 18, United States Code, and any pertinent policy statement issued by the Sentencing Commission, that a sentence outside the guideline range is warranted, the court may impose such a sentence.".

(d) This section shall take effect sixty days following the date of enactment of this Act.

SEC. 4. Effective Date.

Notwithstanding the provisions of section 109 of title 1, United States Code, the provisions of section 3 of this Act shall apply (1) to any defendant sentenced on or after the date section 3 of this Act takes effect; and (2) in any determination under section 3582(c)(2) of title 18, United States Code.

SEC. 5. Commission Authority to Modify Guidelines Promulgated Pursuant to Statutory Directive.

Section 994 of title 28 is amended by inserting the following additional section:

"(y) Variance of Specific Statutory Directive; Amendment of Guideline Subject to Specific Statutory Directive to the Commission.

Notwithstanding any other provision of law, the Commission may--

(1) in promulgating an amendment to a guideline or policy statement pursuant to a specific statutory directive, make such adjustments as the Commission deems reasonable and necessary to effectuate the intent of such directive in a manner consistent with the guidelines and policy statements as a whole; and

(2) subsequently promulgate and submit to Congress an amendment to a guideline or policy statement that has been the subject of a specific statutory directive, provided that any amendment that is at variance with any statutory directive to the Commission shall be specifically designated as such and

accompanied by a report explaining the variance and the reasons therefor.".

SEC. 6. Commission Report Relating to Sentences for First-Time, Non-Violent Offenders.

(a) Report.--Not more than six months after the date of enactment of this Act, the Commission shall transmit to the respective Judiciary Committees of the Senate and House of Representatives a report on sentencing practices as they relate to offenders convicted of controlled substance offenses under title 21, United States Code, who are first offenders and whose offense conduct does not involve violence.

(b) Components of Report.--The report mandated by subsection (a) shall include a consideration of the appropriateness of providing for modifications of current sentencing practices as they relate to such offenders and other related matters as the Commission determines appropriate.

(c) Consultation with Criminal Justice Authorities.--In fulfilling its obligations under this section, the Commission shall consult with

the representatives of the criminal justice system set forth in section 994(o) of title 28, and other persons as the Commission deems appropriate.

Mr. SCHUMER. Thank you, Judge Wilkins, I thank you for your excellent and thoughtful testimony. I have some questions about it.

Before we get to you, Mr. Attorney General, we have a vote, we have 5 minutes. We will try to come back by 1 o'clock and resume.

Oh. Two 5-minute votes? Just two votes. OK. Then we will just have to play it by ear and we will come back as soon as we can.

[Recess]

Mr. SCHUMER. I apologize for the delay. There were indeed two votes.

And now, Attorney General Barr, your statement will be read into the record. We welcome you here. Proceed as you wish.

STATEMENT OF WILLIAM P. BARR, SHAW, PITTMAN, POTTS & TROWBRIDGE, WASHINGTON, DC

Mr. BARR. Thank you, Mr. Chairman. I appreciate the opportunity to be here, and I want to salute you and the committee for taking up this important topic. It has been a hot one, but up until this hearing, frankly, there has been more heat and less light shed on the issue. And, as Congressman Mazzoli said, I really want to commend your opening statement, which was superb, and it was the first time I really heard the facts laid out on the record. And I agree that this is a topic that we really have to deal with on the basis of the facts and not allow myths to drive policy.

I am just going to make three quick points, and I also want to take up the issue you asked me to address, which is this notion of a safety valve and some of the practical concerns I have about it.

I support the current system. I think mandatory minimums are fair in principle, and I think they are being fairly implemented. I think the data shows that the notion that there are—that the system is generating significant numbers of cases where hapless victims are being treated unfairly with draconian sentences is a myth. That as you, I think, are finding, those egregious cases, as you call them, are few and far between.

Second, I think it is important to bear in mind that this is a punishment. These mandatories minimums reflect the judgment of Congress several years ago that the punishment fits the crime. I agree that the punishment fits the crime, and I don't think anything has happened since then to suggest it doesn't. If anything, we know more and more how devastating drug trafficking is, the destruction it causes. I think the drug plague in the United States has cost our society more in lives and treasure and spirit than all the foreign wars that we have ever fought as a nation. The drug trade could not go on unless there were people willing to engage in trafficking. And no one who engages in trafficking these days does so unwitting of the danger of the drug trade, the devastation it causes, and the risks involved.

We have spent 10 years getting the point across that we mean business—that the Federal Government is tough and there are not going to be excuses for participating in this drug trade. And it is starting to sink in and people are scared of the Federal system, and now is not the time, in my view, to be sending a mixed message. People who engage in drug trafficking are engaging in it with a contumacious state of mind, and I think that the 5-year penalty, the 10-year penalty is a just penalty.

The third thing—and I think very important to bear in mind—is how important mandatory minimums are as a practical tool in fighting the drug trade. Picking up again on what Congressman Mazzoli said, Federal prosecutors are not in this to nail mopes who have nothing to offer, hapless people. They are going after the organizations. That is the objective. Federal prosecutors are dedicated people. They are overworked. They want to stop the drug trade and they are going after these organizations.

And I would say the singlemost important tool that the prosecutors have today is mandatory minimums. Why? Because the drug trade is carried on through organizations that are highly secretive, where there are financial incentives to keep that secrecy and to keep your mouth shut even if you are caught, where there is even a risk to your life if you squeal. You can get executed by the drug organization or a related drug organization. And frequently there are ties of culture. For example, some of the drug gangs, the distribution in the United States are tied together with culture and language that make it very difficult for people to squeal.

The only way we have to break into these organizations is to "turn" sometimes the lowest level person so that prosecutors can march their way up the chain, and what makes this process possible is the very stiff penalty of the mandatory minimum. Now, right now the reason the Government can get cooperation is because the defendant knows that there is only one way to break through the floor of that mandatory minimum, one way and one way only, and that is to give substantial cooperation to the prosecutor.

Now, what I am concerned about is the safety valve and what impact that could have. If there is discretion placed in a judge to reach the decision that you can break through that floor, even if you haven't provided substantial cooperation, I think it is going to dilute the strength of this leverage that the prosecutor has. Because then the defendant knows he has another avenue around the mandatory minimum, which is to persuade a judge, not the prosecutor, but to persuade a judge, "Hey, I'm just a de minimis factor and I don't have any information." And, if he can persuade a judge of that, the rug is pulled out from under the prosecutor.

I would be very cautious about a safety valve. But if you determine that this is a sufficient problem that merited a safety valve of some sort, then what I would urge you to consider is one that operates very much like the substantial assistance safety valve. The prosecutor has to be in the loop. That is, the prosecutor files a motion, just as he would file a substantial assistance motion, saying that this person has tried to their maximum ability to cooperate. They have worn the wire that we asked them to wear. They have done everything we have asked and, unfortunately, haven't turned up anything that really amounted to substantial assistance. But they have cooperated. They have testified and so forth, and they were limited players.

And I think there should be a limit on how much it can be reduced, so you still have a fairly significant deterrent even for the de minimis player. Because one thing we have to worry about is the drug traffickers will use the people who have the least to lose. They use kids. And, if we say, "Well, now empathetic girlfriends

are people that are going to get breaks, we are going to see a lot more empathetic girlfriends involved in the drug trafficking."

So I still think there has to be a deterrent. But those are, in a nutshell, my thoughts on this safety valve concept. I think it is important not to just shift it over to the judges, and I think if you look at what the prosecutors' interests are here, prosecutors are getting around the Thornburgh memo in empathetic cases. They are trying to find substantial assistance and they are doing other things to try to give people a break. They have no interest in spending their resources going after a mope that really can't give them anything. So that in a nutshell are my thoughts.

Mr. Chairman, thank you again.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, SHAW, PITTMAN, POTTS & TROWBRIDGE

Thank you, Mr. Chairman, for inviting me to this hearing and allowing me to share my thoughts on the issue of mandatory minimum sentences for federal drug trafficking violations. I particularly appreciate the opportunity to offer my perspective because much of the media attention given to this subject has overlooked the views of law enforcement. Perhaps today's hearing will help to remedy this situation.

My purpose in being here today is to offer my support for the mandatory minimum sentences currently included in federal drug control statutes. I firmly believe that Congress, with the strong support of both Presidents Reagan and Bush, acted appropriately when it established these penalties in the 1980's, and that mandatory sentences have contributed greatly to a major shift in attitude over the past five years concerning drug abuse.

The support I offer for these penalties stands in sharp contrast to the attacks now being waged against them. A clear impression now exists that a substantial portion of the federal prison population consists of non-violent, low-level drug abusers who have never before been convicted of a felony. The picture being painted of this supposed group is one of essentially hapless people who have been caught up in the drug war and are barely culpable of criminal wrongdoing. Moreover, it has been suggested that this large segment of the prison population is displacing the real violent criminals who are presently on the streets because of a shortage of prison beds.

This image of significant numbers of drug war "victims" sitting in federal prisons for long periods of time is simply a myth. Even a quick review of the relevant information, including available statistics, the testimony of federal law enforcement, and federal law, reveals that this image does not square with the facts.

Nearly 80% of the federal drug offenders sentenced in 1992 were either armed, recidivists or found by the court to be leaders or organizers of drug distribution networks. Of the 22 of the federal drug prisoners not fitting this description, nearly half are not incarcerated under a mandatory drug sentence. This means that less than 12% of all drug traffickers in federal prison are serving mandatory sentences and were unarmed non-leaders who had no prior convictions. It should be noted, however, that many in this 12% group could still pose a significant threat to public safety based upon other factors such a juvenile convictions and prior arrests.

These statistics would come as no surprise to federal drug agents and prosecutors. Anyone within those ranks could tell you that nearly all of the drug traffickers they encounter are not merely misguided souls making their first mistake. Rather, they focus their efforts on deadly drug distribution organizations who often view violence as simply a part of business. Indeed, federal law enforcement officials spend thousands of hours training and preparing to dismantle such enterprises.

Finally, there is no legal basis to the claim that drug offenders are displacing violent criminals from federal prisons. Here there are two points to keep in mind. First, since parole was abolished in the federal system in 1987, it is legally impossible to push violent criminals out of prison early. Second, while there has been a large number of drug offenders sent to federal prisons in recent years, there also has been an unprecedented number of violent criminals imprisoned during this same period of time. "Project Triggerlock" alone has netted over 12,000 felons using firearms in only the past two years.

Beyond these important facts about the true composition of the federal prison population, we must not lose sight of the severe threat drug abuse poses to the public's well being. In the 1980's, Congress made the judgment that drug trafficking is a

heinous act and established punishment that fits the crime. I still believe that the punishment fits the crime.

Consider all that our nation has been through over the past decade in the struggle against drugs—the virtual devastation of neighborhoods, the destroyed lives of drug abusers, the murdered law enforcement officers and their suffering wives and children, the newborn children who have entered life as drug addicts. Add to these numbers the hundreds of brave judges, police and soldiers in Colombia, Italy and other foreign countries who have died violent deaths fighting the drug lords. The conclusion is clear. The penalties Congress established for drug distribution unquestionably match the destructive effects of the crime.

It is difficult not to conclude that those who continue to engage in drug trafficking after all that this nation has been through must possess a contumacious state of mind. In weighing the substantial risks involved against the specific business opportunity, they display a cold and calculating nature. It is obvious that such behavior is completely inconsistent with the best interests of the community in which they live.

Not only did Congress act justly in creating mandatory sentences, but it also gave federal law enforcement an extremely valuable tool for dismantling drug distribution organizations. Drug trafficking enterprises are highly integrated structures. Thus, law enforcement officials frequently rely upon those within the conspiracy to acquire evidence of criminal violations. Mandatory minimum sentences have proven to be a very successful tool for law enforcement in working its way up in an organization.

In conclusion, Mr. Chairman, I hope that you and your colleagues will proceed cautiously in reviewing this issue and considering any changes to the law. I have reservations about creating a safety valve which empowers the judiciary to automatically nullify a mandatory sentence. Such an exception could undermine the effectiveness of mandatory sentences as a law enforcement tool because defendants, knowing that the judge will waive the tough sentence, may claim that they cannot provide substantial assistance to the government. I trust you will weigh this concern in your future deliberations.

Mr. SCHUMER. Well, I want to thank you for your very interesting testimony. In this hearing we are really trying to learn and grope with an issue that is a difficult issue. There is no easy answer. And both, I think both you, Judge Wilkins, and you, Attorney General Barr, have helped with that.

Judge Wilkins, let me ask you first a couple of questions about what you mentioned. If, in your proposal of a safety valve going below the guidelines, your general proposal, would there be a limit on how low you could go?

Judge WILKINS. Absolutely.

Mr. SCHUMER. What would that be?

Judge WILKINS. The guidelines now work independent of mandatory minimums.

Mr. SCHUMER. No, I understand.

Judge WILKINS. And the same mitigating factors apply in those cases that I am suggesting should also be allowed to apply in a mandatory minimum drug case.

Mr. SCHUMER. So what you are simply saying is pass a mandatory minimum but don't make that the floor, make that sort of the average, the level for the average person and you can go up a limited amount and down a limited amount?

Judge WILKINS. That is what I am saying. That is right. And it would be a structured up and down. If it weren't structured up now—in fact——

Mr. SCHUMER. Yes, I understand.

Judge WILKINS [continuing]. Seldom is the mandatory minimum penalty the actual sentence imposed on a defendant who has any aggravating role because the sentence is going to be structured up.

Mr. SCHUMER. I understand. The fear that this committee has, most of this committee, certainly most of the public, is that if you allow too much discretion on the down side people who deserve to go to prison won't or that people who deserve to go to prison for a significant sentence will get a slap on the wrist, the 6-month-type situation.

Judge WILKINS. That is correct.

Mr. SCHUMER. If that fear is real I will tell you what will happen if your proposal is passed. They will just up the mandatory minimum. So if they worry that someone might get 2 years when they think they should get 4, instead of passing an 8-year mandatory minimum they will pass a 10- or 12-year mandatory minimum and it would be counterproductive.

So one thing I would urge, and I would look forward to looking at your written submission, is that there be some guaranteed floor as to what the sentence could not go below in terms of a percentage of the guideline. And that might be helpful, it might not. I can't tell. I would have to talk to my colleagues and think it over myself in terms of that. And right now you don't have that——

Judge WILKINS. Yes, we do.

Mr. SCHUMER. You do.

Judge WILKINS. The guidelines provide the floor, Mr. Chairman. The judge cannot, facing a defendant who has a very minor peripheral role in a drug conspiracy and who has accepted responsibility, that judge is not allowed to sentence to whatever sentence the judge thinks is appropriate.

Mr. SCHUMER. Well, I understand that.

Judge WILKINS. The guidelines will say, here is the bottom line.

Mr. SCHUMER. I know what the guidelines do. In your proposal it seemed more tentative. You don't mean that?

Judge WILKINS. No, I did not mean that.

Mr. SCHUMER. So in the example you told, the person who got the 10-year were the average people, the 16-year was the ringleader, and the 5-year was—I can't remember the—was it courier?

Judge WILKINS. A courier.

Mr. SCHUMER. For a minor participant, the court couldn't go below 5 years, the judge could not go below 5 years, for instance?

Judge WILKINS. Through the operation of the guidelines, that is correct. That is the minimum. The fellow might get a 6½-year sentence——

Mr. SCHUMER. I understand.

Judge WILKINS [continuing]. Because the judge has arranged that that would be the bottom. Except, Mr. Chairman, so there be no misunderstanding, under the Sentencing Reform Act judges who can identify an aggravating or mitigating factor not considered by the guidelines can depart above or below the guidelines. The judge couldn't use minor role again, but some other mitigating factor could be a basis for the departure.

Mr. SCHUMER. Right. Yes.

Judge WILKINS. And there are only a few very limited factors recognized by the courts. The judge then could state that reason on the record and sentence below the guidelines.

Mr. SCHUMER. Right.

Judge WILKINS. That occurs in all cases other than when mandatories apply. But it only occurs in 6 percent of all the cases.

Mr. SCHUMER. And that is what you refer to as the safety valve in the guidelines itself?

Judge WILKINS. That is correct.

Mr. SCHUMER. That is correct? OK. And that I think, even though it is only 6 percent I think that would cause a great deal of worry out in the public and with this committee. You know, I have some resentment of people who think this is what the public wants and all of that. Yes, it is what the public wants because they have been through a very bad experience before, and there is nothing wrong with the public wanting to be very safe. I mean to me the greatest failure our Government has, period, is that we are not safe. That is what men and women got together to form government about: external—fight a war, have an army; and internal—be safe as you walk around.

Judge WILKINS. We share your concern.

Mr. SCHUMER. I know you do. And I know everybody here does. And I accept my colleague from Michigan's statement that everyone wants to deal with crime and there are different ways to deal with it, and that is why we are a Congress.

But the idea that people who want to be safe or people who have one position are just doing this out of some malice I reject and find troubling. Worse than troubling, but I can't think of the right word.

OK. Mr. Barr, what do you think of Judge Wilkins' proposal?

Mr. BARR. I would oppose it because I think that the legislature should in certain cases set a floor for certain crimes and basically say we are not going to allow mitigation except under defined circumstances. And I would not like to see judges have any appreciable discretion to go below that floor, and I think the discretion they have now under the guidelines is a little bit too malleable and I am concerned of the erosion of that floor and the impact that would have on using it as a hammer to open up organizations.

So for that reason I would say that if there is going to be a safety valve the prosecutor has to move for it under defined circumstances.

Mr. SCHUMER. All right. And you made a very important point that I appreciated. And not being a prosecutor myself, I think it is an important one that you made.

But what do you say to a person like our witnesses here, particularly the young woman who is incarcerated herself? That to me was the worst case we found. There are others that are less bad, but still probably the sentence is a little bit too long.

What do you say to her? Go ahead. I don't want to put any words in your mouth.

Mr. BARR. I don't know enough about—I don't want to comment on her case because I haven't talked to the prosecutor.

Mr. SCHUMER. Well, let's assume the prosecutor was wrong. Maybe he made a judgment, for instance, that she could lead him to others. In Ms. La Rotonda's care, it perked my ear up that the Colombians who were at the top got 15 years, and maybe the next rung got less because they brought in the Colombians.

Mr. BARR. Right.

Mr. SCHUMER. And that is a justifiable prosecutorial decision. But let's say in this case here she didn't know of anybody and the prosecutor made a judgment—we will squeeze her, she will turn somebody in—but there was nothing to squeeze out of her. What do we say to her?

Mr. BARR. I think more likely in this case, if this is a really empathetic case where she was willing to provide information, willing to testify against her boyfriend or what have you, accepted responsibility, that the prosecutor may have felt he didn't have an alternative under the mandatory minimums and that there was such a substantial amount of drugs involved that she got hit with a very high sentence, which I think was above the mandatory minimum, which suggests that there were aggravating factors involved in the conspiracy.

Wasn't it 12 years?

Ms. STEWART. No. She got 10.

Mr. SCHUMER. It was 12—was it 12 years?

Mr. BARR. No. She got 10.

Mr. SCHUMER. She got the 10.

Mr. BARR. All right.

Mr. SCHUMER. They asked for 12, she got 10.

Mr. BARR. I would say that the safety valve that I am suggesting would deal with that because the prosecutor would be satisfied that this just wasn't someone who was saying that they had nothing to provide, who was in fact really willing to be cooperative.

I would also say, though, that I am not so ready to—I am worried about the implication that somehow involvement in trafficking is not culpable behavior. Nowadays, in my view, people who hang around and associate with individuals who are engaged in large-scale transactions and had sufficient participation in that to assist in those transactions are highly culpable individuals.

Mr. SCHUMER. Mr. Mazzoli and Mr. Schiff, in fact, have made that point throughout the hearing, and I completely agree with it. The question is just how long the amount of jail time should be. It is certainly culpable behavior.

Mr. BARR. Let me just point out there is also right now a safety valve, and I am not suggesting that you just treat this as the only safety valve, but if the current Attorney General and if this administration thought there were cases in the Federal system where there were miscarriages of justice they always have the power of clemency, and they could commute this person's sentence to time served at any time.

Mr. SCHUMER. Right. Judge Wilkins, what do you say about Attorney General Barr's view that if there are other ways to get below a mandatory minimum, particularly in these drug cases because that is where we are focusing, that the defendant will say, well, I don't have to wear the wire, I don't have to do the full cooperation, because I am a low-level person I will get a reduced sentence anyway, because there will be another reason for it?

Judge WILKINS. My experience as a prosecutor and as a trial judge for about 6 years tells me that minimal participants line up at the door and beg to come in to cooperate with the Government. The problem is they seldom have any real meaningful information to give. Consequently, they do not receive the benefit of the sub-

stantial assistance motions that the law allows prosecutors to make. I don't think there is any question about it.

What we are talking about is a recognition that some people who are in a minimal role should get some proportional consideration. Bill and I agree on that. He says it should be structured. I say it should be structured. The guidelines provide a very, very tight structure. If you don't believe me, bring some Federal judges up here and they will tell you how tight it is.

The only difference I think we have between us in recognizing that this is a problem and there should be some reasonable solution to it is his would turn on certification of the prosecuting attorney that this person is a minor participant and then the structured reduction would occur. I am suggesting, as in all other guideline cases that the situation turn on a decision by the district judge based on facts found on the record subject to appellate review.

Mr. SCHUMER. Right. Judge, you have told me personally, and I believe it is in your written testimony, that you might prefer no change. You mentioned before you would prefer to keep the mandatory minimums if there was nothing, if there were no guidelines as a buffer.

And it is true, I don't see that the two are that much at loggerheads. There are different methods and there are questions of leverage and there are questions of egregious cases, but still they came out of the same root problem and they are not as different as some would like them to be. That the guidelines are all good and the mandatory minimums are all bad, or vice versa. That the mandatory minimums are the end-all answer and the guidelines won't protect us from any of that.

If you had the choice of no change versus a safety valve broadly defined, which would you prefer?

Judge WILKINS. Well, it is difficult to answer you, of course, because the broad application——

Mr. SCHUMER. I shouldn't say broadly defined. I should say nondefined. Just the concept.

Judge WILKINS. I would probably, without having the specific safety valve you are talking about, opt for no change because I don't think we are going to generate enough attention to this problem soon again to provide a solution to it. If some solution comes along that is not a good solution—and some safety valve approaches will not be good solutions because if they turn on too much discretion, or if they turn on too much prosecutorial discretion or too much judicial discretion, it is just kind of a band-aid—then we are going to open up the problem, reintroduce unwarranted disparity, which is back to the old problem that we are trying to solve with the mandatories or with the guidelines.

Mr. SCHUMER. Would there be some safety valves that would be better than no change?

Judge WILKINS. I have offered you one.

Mr. SCHUMER. Well, that is not quite a safety valve, but——

Judge WILKINS. Well, you see, I think it is, Mr. Chairman. That is what I am trying to get across. What it says is where you have established facts on the record that this person is not your typical offender, and you must have had that person in mind when you were talking about mandatories, but is a low-level—the example I

gave was an errand boy for the drug conspiracy, that person is facing 10 years. I want this person to go to prison. I think everybody that looks at it objectively thinks this person should go to prison because he is involved in a major drug conspiracy. But the involvement is only on a peripheral level. The safety valve applies to that person and would allow a sentence, as I say, with two mitigating factors the guidelines recognize, and only two apply to receive about a 5-year sentence without parole. That is a stiff sentence for that type of offense, in my judgment.

Mr. SCHUMER. OK. I understand that. It is just that it is a different conceptual framework. I mean the safety valve to me implies the guidelines, or the minimum is applied and then there is some separate procedure that says, wait a minute. This was a miscarriage. You get a second bite at the apple to prove under certain limited circumstances that it was overdone. It is a little different than yours.

And I don't know if it is workable, I really don't. I am just throwing it out here.

Judge WILKINS. Well, you see, we have been into this now for 8 years. I know when we start talking in broad generalities and principles and desirable goals, and then you get down to the actual writing, as you do with legislation, you know how difficult it gets and you start making fine cuts. If you are talking about an individual who is a first offender, how are we going to define that first offender? No contact with the criminal justice system. A person who wrote a bad check at age 17 for $10 at the 7-Eleven. Is that going to disqualify that person from the safety valve.

See, the guidelines use a proportional approach——

Mr. SCHUMER. I understand.

Judge WILKINS [continuing]. Taking in the criminal record and so forth.

Mr. SCHUMER. It is a tradeoff, flexibility versus certainty. But I don't know if it is undoable.

I just had one final question for you, Judge. It is my understanding that the Commission recently rejected an amendment to the guidelines that would have, in effect, given judges the power to move on their own, sua sponte, to reduce sentences for defendants who gave substantial assistance to the Government. Right now that power is held by prosecutors.

Why didn't that happen? Why was it rejected?

Judge WILKINS. First of all, as you know, the statute provides that the motion must be made by the prosecuting attorney——

Mr. SCHUMER. I know. Right.

Judge WILKINS [continue]. To move beyond the mandatory minimum, and another statute directs the Sentencing Commission to have a comparable type approach to it. It has been suggested by many that defendants who would be able to convince a judge that they provided substantial assistance should get the benefit of a downward departure, or really a sentence outside the guidelines.

It was my judgment and the judgment, I think, of at least the majority of the Commissioners that this was really going to open up the sentencing system to a situation where, quite frankly, judges being unsympathetic with mandatory minimums, unsympa-

thetic with the guidelines, would simply use that as a way to get around some of the tough sentences that the guidelines provide.

Another reason, Mr. Chairman, and just as important, it would have no effect on the judge's ability to depart beyond a mandatory minimum.

Mr. SCHUMER. I understand.

Judge WILKINS. Because the statute requires a prosecutor's motion. So there may be some movement there if we were to adopt that within the guideline ranges, but never below the mandatory. So it would have minimal effect anyway.

Mr. SCHUMER. Thank you, Judge. Mr. Barr, did you find any evidence when you were Attorney General that violent criminals either were not being given jail terms or were given reduced jail terms because of the minimum mandatory law and first-time drug offenders taking their places in prison?

Mr. BARR. First, emphatically, in the Federal system there is no displacement going on. Violent criminals are not being released because of drug prosecutions and convictions.

Mr. SCHUMER. What about at the State level that you might have familiarity with?

Mr. BARR. I looked at this somewhat at the State level. There is a problem, of course, with violent criminals, in my view, being cycled through the revolving door too quickly. However, I do not think that there is any appreciable displacement going on in the United States. I think the best case for it was made in Florida. I think a study was done in Florida.

Mr. SCHUMER. I think it has influenced the Attorney General some. I just gather that. Haven't talked to her about it.

Mr. BARR. I think that's a fair——

Mr. SCHUMER. But it's in her statements. Yes.

Mr. BARR. That is probably a fair assumption. The study was done in Florida. I am not a student of that study, but statisticians who have looked at it for me have told me that it is very inconclusive and a lot more investigation would have to be done, just in Florida, to determine whether in fact there is displacement going on.

But I would be very surprised anywhere in the country if there was any significant displacement going on right now.

Mr. SCHUMER. Do you see a distinction between drug and gun offenses when it comes to mandatory minimums?

Mr. BARR. I think they both require stiff mandatory minimums but for different reasons. I think one of the reasons we want drug mandatory minimums is to penetrate the organization, as I discussed. Guns, I think the level of violence has reached such a height that we need the most severe deterrent we can possibly muster to prevent people from carrying guns.

Also, I think it is a good proxy for violent, people with a propensity for violence, who are the people we should be targeting on incapacitating by putting in prisons, and therefore I think that the incapacitation argument is strongest for people who are carrying firearms.

Mr. SCHUMER. Thank you. I want to thank both witnesses myself.

Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. Judge Wilkins, there has been a lot of discussion about the so-called first offender, nonviolent offender—first-time offender, nonviolent offender in prison under mandatory minimum sentences. Do you have any figure as to how many individuals that actually is?

Judge WILKINS. I could supply that for you. I would hate to offer——

Mr. MAZZOLI. I have asked for that for weeks and weeks and months. Nobody seems to have that.

Mr. SCHUMER. Is that in the Federal system?

Mr. MAZZOLI. Yes.

Judge WILKINS. Well, I have my staff director—I am sure we can provide that figure. We have all the data.

Mr. SCHIFF. If you could, at your——

Judge WILKINS. What is it?

Mr. SCHUMER. In prison? Yes, it is not available.

Mr. MAZZOLI. We are looking for the choirboys that are in there.

Mr. SCHUMER. It is available—if the gentleman would yield—as I understand it, because we have looked for this for a while, they could do it for the last 2 years, but, obviously, that is not the whole population of the Federal prisons. They have not done it for the 2 years, but it is doable. Before that they didn't keep records as to why the sentence occurred and whether there was a minimum. A mandatory minimum. Sorry.

Judge WILKINS. I can tell you this. Take our definition of what we call zero criminal history points, which means no conviction or convictions that are now stale because of the passage of time, 10 or 15 years, depending. Take those individuals and then look at whether or not they had an aggravating role in the instant offense for which they are serving time, whether or not there was any violence, or whether or not there was any gun used. You put those together and about 34 percent of the prison population of those sentenced in 1992 have none of these aggravating characteristics.

But again, you have to be careful with that because it is our definition of a zero point criminal history. You will find some people in Federal prison who have a criminal history of some time ago that because of the operation of the guidelines it is no longer counted as an aggravating factor.

Mr. SCHIFF. And again, as you said, that gets in the definitions too. I am not sure we would all agree on who is nonviolent, as you have heard in this discussion.

Judge WILKINS. That is a very difficult thing to define, and I know this committee would be very careful in how it defines these things. We need to know the question exactly. Then we would try to provide you the absolute data under very strict research principles, because these things get thrown around too loosely sometimes.

The General Accounting Office's study seems to suggest that those who should get the mandatory minimum sentence, by and large, did get that sentence, or I should say at least that sentence since many times the sentence was actually greater. It is my understanding that the Commission's own report included the opposite, or in the direction of the opposite. How would you explain any difference?

I think the GAO report said that—in what—in 85 percent of the time when the mandatory was applied it was applied correctly. I would hope it would be higher than 85 percent. But what our studies did show is that in many cases, and it is a difficult call, but I would venture that in at least 25 percent of the cases the mandatory minimum applied to this defendant but for one reason or another was not sought.

Indeed, in one area where the statute requires that the mandatory minimum is double because of a prior record—specifically because of a prior felony drug conviction—that double mandatory penalty was sought in only 38 percent of the cases that it could have been sought. It is not difficult to look at that figure because you either had the prior record or not. It is not a judgment call of whether or not I can prove the case and so forth.

So I think there are legitimate reasons, of course, why mandatory minimums are not applied to a given defendant in a given case, and Attorney General Barr has indicated some of those. I do believe, and I know from my own experience, that many times some prosecutors look at the case and they say I need a plea, I won't charge a mandatory. It is just an ease to move the case out of the door, or sometimes they believe the mandatory is simply too harsh. We know of some districts where mandatory minimum penalties are circumvented as a matter of course, whereas, of course, I would suggest if we got the law on the books it ought to be applied uniformly and consistently throughout the country.

Mr. SCHIFF. That brings me to you, Attorney General Barr. You have spoken strongly in favor of structure in the system. And, of course, General, I agreed with you at the very beginning of the hearing. I stated my support for sentencing guidelines as something that community standards of some kind in all of sentences.

But I think it does raise the question what is the structure on the prosecutor in the sense of that same community standard? As a former career prosecutor, I understand that it is not always possible to charge every case in the same way. There could be differences in evidence, strength of evidence, along with everything else we have heard.

But I haven't heard what really promotes the same kind of cohesion among prosecutors in the system so that there is not great disparity created between differences between opinions of the local U.S. attorneys as there used to be great disparity between the opinions and philosophies of different judges.

I wonder if you might address that.

Mr. BARR. The principal effort to enforce some uniformity was the Thornburgh memorandum, and from time to time there were criticisms, mostly from judges saying that they thought the Thornburgh memorandum was not being followed. The Sentencing Commission started looking into that. Some jurisdictions such as the Eastern District of New York were following policies on couriers, for example, that seemed to depart from the Thornburgh memorandum. And the Justice Department is constantly taking action to prod the prosecutors to adhere as best they can to the Thornburgh memorandum.

But I think we have to recognize that because of resource decisions you will always have to have discretion exercised by a pros-

ecutor. A prosecutor cannot prosecute every single potential violation in the district. He has to go after the things he considers the most important.

So you may have a district where marijuana is the number one drug problem. There the threshold for prosecuting marijuana production may be different than the threshold in a jurisdiction like D.C. where crack may be the number one problem.

And the Eastern District of New York would say that "If we prosecuted every single courier then we wouldn't be able to prosecute some of the other important drug cases where the payoff is much bigger." So unless we are willing to give unlimited resources, there have to be those kinds of decisions made. That leads to discretion being exercised and disparities arising throughout the country.

In my view, that kind of discretion is far superior and does less damage to the system than shifting that discretion back to judges.

Mr. SCHIFF. You are not surprised if the judges don't entirely agree with you?

Mr. BARR. That is what the whole debate is about. And the judges, in my view, the judges had their run at discretion and the results were not good for society.

Mr. SCHIFF. Let me ask you two instances and then I will yield back to the chairman. Situation—someone who is participating in trafficking, so we are not dealing with culpability, is so far down the ladder, wants to cooperate with law enforcement when apprehended, has nothing to offer. You know, can't tell them a darn thing. The person above them, a bit more involved, has some information for law enforcement, offers that information and thereby gets a lower sentence than the—under a substantial assistance motion by the prosecutor—than the bottommost individual. For the bottommost individual, could there be some relief? Or is that just a you take your chances kind of thing, and if you can't offer anything of use, we are very sorry but there ought not be any relief?

How would you view that situation?

Mr. BARR. First, as to these much ballyhooed cases of couriers coming in and not having anything to offer, I would like to see some of them. I think the fact that Chairman Schumer had some difficulty scrounging up empathetic cases show that these are sort of hypothetical cases that are talked about as debating points. But couriers usually do, are in a position to provide assistance.

Mr. SCHIFF. Everybody knows something, in other words.

Mr. BARR. Right. Second, in my view, as to a courier, the 5-year or the 10-year penalty, depending on quantity, is a just sentence for that individual. That is justice in that case. The fact that for someone higher up, we are sometimes willing to reduce the sentence, essentially give the guy a break and maybe give an "unjust" sentence—unjust in the sense that it is too lenient—to that individual in order to go after someone that we consider more important, that happens all the time in numerous contexts in law enforcement and I don't think it affects the justice of the sentence given to the lowest level person.

But you raised a point that is sort of a permutation of that that I want to address, and that is do you give the guy up the ladder a break for testifying against people down the ladder.

Mr. SCHIFF. That was my second point. The allegation has been made, I do not know if it is true, or if it is true, in how many cases it is true. The suggestion has been made that the scenario you gave exists not just upwards, which makes some sense, I think, to everybody, but downwards. In other words, if you are at this level and you will testify to bring in the people who are underneath you, you will get the break, they will go to prison longer.

I wonder if you have any feeling whether that is a correct criticism of the system?

Mr. BARR. I don't think it is a correct criticism. I would be very surprised to see any appreciable number of cases where that occurs. I think what you will find is two different kinds of situations, one where there is a dispute as to who is more culpable. As you know, when a drug organization gets busted everyone is pointing fingers at everybody else, and I think there may be a lot of cases where the guy says, "Hey, I was just the little guy and that guy is the big guy." But there is a dispute as to that.

The other kind of case I think you will find—you shouldn't jump to the conclusion, and I am not suggesting you are, but people should not jump to the conclusion that just because in a particular prosecution a top guy got 2 years and a bottom guy got 5 years means that the cooperation by the top guy related to that case. The cooperation by the top guy could be turning in—giving valuable information against another organization, perhaps his supplier, the Cali cartel. That prosecution may not take place for another 3, 4, 5 years.

So the cooperation can be as to a broad range of things, and I certainly as a prosecutor would not take substantial cooperation to be turning in someone who is below you.

Mr. SCHIFF. Let me just say I would agree with that. And I don't know if it occurs. It is merely one of the things that I have been told over and over again at least why we are having these hearings.

I want to thank both witnesses, and yield back to the Chair.

Mr. SCHUMER. Thank you, Mr. Schiff. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. And we are all grateful to hear the testimony of these two witnesses. I think it is rather encouraging, at least to someone who worries about this issue that all the witnesses say the system needs fixing. At least—Mr. Barr probably doesn't think very much should be done, but Judge Wilkins sees some flaws in the system, and certainly the previous witnesses, the women, would like to make some major changes.

Something you said, Judge Wilkins, interests me. A prosecutor can look at a case before he has made his decision on what to charge and he can decide not to bring a drug charge. Instead, he can bring a charge based on some other aspect of the crime, such as carrying a gun, to avoid the impact of the mandatory minimum. Isn't that correct? Isn't that what you said, Judge Wilkins?

Judge WILKINS. Yes, sir. I did say that, Mr. Edwards. The charge selection many times can be used, or sometimes at least can be used to avoid——

Mr. EDWARDS. The prosecutorial authority.

Judge WILKINS. Either that or failure to give notice as to the quantity of narcotics being sought in a particular case by the Government. That also triggers mandatories, as you know.

Mr. EDWARDS. We have heard that too, and we have heard that people who have money and the best lawyers in town can do a lot better than the poor person, often a minority, who doesn't know how—he gets a public defender who doesn't know how to plea bargain and who doesn't know how to write all of the important briefs that apparently have some influence. How do you respond to that?

Judge WILKINS. Well, quite frankly, from my experience I think our Federal public defenders do an excellent job throughout the country. Many times they are more experienced than the private attorney.

Mr. Edwards, I will have to say I don't really see that as the major problem that I am trying to address. It was at one time. But with the advent of sentencing guidelines, the guidelines operate not so much on the charge selected by the prosecutor, but act on the real underlying misconduct of the offender who is in the courtroom to be sentenced. This disparity that can result from a lot of charge bargaining and selection and so forth is minimized because of the operation of the sentencing guidelines.

My primary objective here today is to say the mandatories are here and they work today under the guidelines as aggravating—I mean the guidelines aggravate. But the guidelines are not allowed to fully operate because mitigating factors are not allowed to be recognized when a mandatory minimum offense statute is charged.

Mr. EDWARDS. Well, why do we have to have the mandatory minimums as long as we have the guidelines which in themselves have that aspect of mandatory minimums?

Judge WILKINS. You are correct. We lose sight sometimes of the fact that our guidelines are mandatory in nature. As I testified in my opening statement, if somehow the minimum mandatory sentences were abolished today, the guidelines would still operate and the same sentences being imposed today in the Federal courts would be imposed tomorrow under the guidelines. So there would be little change in actual practice in the courts.

What could change, of course, over time is that the guidelines could be modified, reduced or increased as far as the punishment is concerned by the Sentencing Commission. I understand that would be a concern of this Congress. That is why I have suggested in this proposed legislation that you, the Congress, tell us the starting point with the mandatory minimum statute, which would be in concrete and could not be changed by the Commission. Then we would be allowed to aggregate up or mitigate down as the facts would dictate.

Mr. EDWARDS. Well, the guidelines can be changed by Congress anytime Congress wants to change the guidelines.

Judge WILKINS. They certainly can.

Mr. EDWARDS. Right.

Judge WILKINS. Certainly can.

Mr. EDWARDS. So I think you have made a case for what I said. We could eliminate the mandatory minimums that we are talking about that some of us feel have caused a lot of trouble because this issue is being handled very nicely by the Sentencing Commission.

Judge WILKINS. They are handled today.

Mr. EDWARDS. Right.

Judge WILKINS. And the same sentences, I would say, would result tomorrow even if they were abolished today because of the structure of the sentencing guidelines.

Mr. EDWARDS. I think we ought to make it a matter of record that when Congress puts into a criminal law a mandatory amount that a person must serve so many years or something, that amount is usually not the result of the hearing process we have here in Congress. It is sort of an arbitrary thing put into the original bill. Nobody ever questions it. Whoever thought up the bill puts it in. Well, I will put in 5 years. I will put in 10. And that is it. And that is never—I have been here a long time. I have never seen any thought given in a committee such as this or any other committee to whether we ought to look at the sentence and see what effect it is going to have on society. Is that too long or is that not enough? And get some experts in to talk about it. It is pretty important.

The last question I have is, since the celebrated war on drugs and the mandatory, a lot more mandatory minimums and the Sentencing Commission have come into being, starting I believe in about 1980. Then, we had maybe 25,000 Federal prisoners. Now we have about 57,000. We will have to correct this, but I am within——

Mr. SCHUMER. Eighty thousand.

Mr. EDWARDS. All right. Now we have 80,000 and the calculations are we are going to have 117,000 by the turn of the century and so on. The same increase going on indefinitely.

Is that any kind of a serious problem, Mr. Barr?

Mr. BARR. No, I don't think it is a problem.

Mr. EDWARDS. No problem.

Mr. BARR. I think, first, that the mandatory minimums were carefully designed by this committee. A lot of time was taken with DEA as to the threshold amounts and as to the appropriate sentences. They were carefully thought out.

Second, I think that we backed off mandatory minimums in the 1970's. We did away with mandatory minimums, and it was during the 1970's that the drug problem got way out of control and a lot of damage was done to our society. And I think that we are on the right track with a very tough law enforcement system, including mandatory minimums, and the only problem in this country right now is not at the Federal level, it is because the States haven't caught up to the Federal level.

And it does not shock me that in a country of—now approaching 300 million people that the Federal Government has about 80,000 people in prison. That is not any disparity, in my view, considering that we have the highest crime rate of any advanced country in the world.

Mr. EDWARDS. Thank you.

Judge WILKINS. Mr. Edwards, could I comment on something you said, very briefly?

Mr. EDWARDS. Yes. Please.

Judge WILKINS. The Sentencing Commission has the most extensive data set ever assembled by any Federal agency or State agency. We place ourselves at your disposal to respond to questions

seeking information, facts and data, so that when decisions are made on mandatory minimums or any other area of the criminal justice sentencing system you can have as much information as you can gather so that the decision will be informed.

We are here and we have data and we can provide it for you. I might say that in one of the statistics I gave to Mr. Schiff—the zero criminal history category—we have extensive data there. One thing we are missing that is a factor that would change things, I am sure, is that we don't know what is the criminal history of foreign nationals coming into this country. So that figure of 34 percent would be changed somewhat by that. But we could probably, with some extensive research techniques, exclude those people and see what it would be if we didn't include those and so forth.

But at least we could help try to identify the safety valve or my approach or whatever approach we are looking at so we all have all the information we could possibly gather.

Mr. EDWARDS. Wasn't the parole system a safety valve?

Judge WILKINS. Well, if it was designed to reduce prison sentences, it certainly was.

Mr. EDWARDS. Thank you. Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you, Mr. Edwards. And first, Judge Wilkins, I am glad you added in the foreign nationals because that is what I think was the great disparity between the statistics your Sentencing Commission gave us on——

Judge WILKINS. There were other problems too.

Mr. SCHUMER. Right. I understand.

Judge WILKINS. It was the question—you asked the question whether or not a prior arrest with no convictions should be included or not, and it was under some runs, it wasn't under others.

Mr. SCHUMER. Right.

Judge WILKINS. But again, I think it was different people being asked different questions.

Mr. SCHUMER. Yes.

Judge WILKINS. But we can get on the same wavelength and have all the facts given to you.

Mr. SCHUMER. Right. And that is what I want.

I wanted to compliment you and the Sentencing Commission for being always available with the data and everything else. We appreciate that and your interest and concern.

Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. It is really excellent hearings. I want to thank our two witnesses today for excellent testimony.

Judge Wilkins, I wrote down just a few things as you were speaking which impressed me a great deal. You said what we are looking for is efficiency, effectiveness and fairness in the application, and I think that is what this panel is looking for too, candidly. So I think your idea is something that we could study. The gentleman from New York, our distinguished chairman's idea is something we should study. And I think we could, maybe, come up with something like that.

I probably differ with you a little bit on the fairly frequent use of the term minor or peripheral drug activities and minimal activity with regard to some drug activity, or minimal contact. It just

seems to me that we may be minimizing something which is just tearing America apart. I mean by the very nature of our terminology. Saying he is just a minor actor. He is just a bit player. He is just a walk-on. You know, he is only a peripheral person.

Unless you had the drug courier, you don't have the stuff gotten into the country and therefore don't get it out into circulation. And if you don't have that, then you don't have the guy who shoots himself or ingests it, and we don't have people killing one another in the streets. So I mean I think we have to be just a little bit cautious in how we minimize that person's responsibility for the ultimate of the horrible violence and killing and wasting. And Mr. Barr had said the lives and the treasures and the spirit of our country are at risk as a result of this.

So, anyway, I just was wondering. I just wonder if you, in your mind do you have a picture of one of these minor participants? You know, could you describe that he or she looks like?

Judge WILKINS. This mitigating role is recognized under the guidelines today in many areas.

Mr. MAZZOLI. No. But I mean can you describe to me the person who would fit the role of minimum or peripheral.

Judge WILKINS. Yes, sir. I can. But I wanted to say, first of all, the sentencing guidelines today identify a mitigating role for some defendants, and so it is just not the judge saying, well, you look kind of minor to me. I am going to give you a break. It doesn't work that way.

In fact, of all the drug cases, of all the thousands of defendants, the judges say you are deserving of a mitigating role based on the facts only in 16 percent of the cases,

Mr. MAZZOLI. Good.

Judge WILKINS. And these are the types of individuals who——

Mr. MAZZOLI. What would that person look like?

Judge WILKINS. They are on the edge of the conspiracy. It is the girlfriend of one of the drug dealers who is there, who perhaps answers the telephone, who may run errands. It is the boat offloader who is paid 500 bucks to offload this boat and that is it. He walks away.

It is those people who are lower than the average participant. They have got nothing to do with any policy decisions, nothing to do with the money, nothing to do with any decision. They are there as functionaries.

Mr. MAZZOLI. Could I go back to something, Judge, that is—I think it is very important. And I don't want to be the burr under the saddle here, but I keep saying we need to have information. Can you tell me how many of those kinds of people, the person who offloads—he is like a day laborer, and he said instead of offloading tomatoes we will offload cocaine, and he walks away. I mean how many of those really wind up in the system? How many are we really talking about? How many girlfriends of guys who had nothing, except that they loved this person and they have no other contact—how many of them are we talking about?

Judge WILKINS. Well, I think we are talking about a sizable number.

Mr. MAZZOLI. You think so?

Judge WILKINS. Yes, sir.

Mr. MAZZOLI. Who wind up in the system?

Judge WILKINS. Yes, sir, who wind up in the system, are prosecuted——

Mr. MAZZOLI. And who are therefore busted under various minimum——

Judge WILKINS. That is right. And should be. Should be prosecuted. Should be sentenced. And couriers need to be punished.

You know we have got the foreign nationals coming in every day in our major port cities, bringing in large quantities of narcotics, and they need to be arrested and prosecuted and sent to prison. The question is where do we achieve crime control? By that person staying in prison for 10 years? Or can we achieve it more efficiently through some reduced sentence?

Mr. MAZZOLI. Can I just suggest something? I will be really quite honest with you. I am astonished that you all who are advocating major fundamental change in here come in armed with no statistics whatsoever. Everything is, well, we think there is a lot of people, we think that there is a whole bunch of these folks, and there is quite a lot of them but we will have to get the data for you later.

Nobody—and this is the second time we have been through this routine. Nobody but nobody comes up, and the chairman himself has said he begged for the egregious cases and found only two or three that fit that kind of description.

Judge WILKINS. This is the first time I have been through it. You just asked me how many minimal or minor participants would there be and I told you 16 percent. That is what our figures show. That is who I am talking about, as far as the mitigating role is concerned.

Mr. MAZZOLI. And those 16 percent, you would tell me then, Judge, with respect, would be the kind that offloaded the ship and the girlfriends?

Judge WILKINS. And others who have——

Mr. MAZZOLI. And others like couriers, like mules—right?

Anyway, Mr. Barr——

Mr. BARR. Congressman, could I say something first?

Mr. MAZZOLI. Please. Go ahead.

Mr. BARR. I am not advocating any change to the system. I want it clear I am satisfied with the existing system. I do not think it is a significant problem; that is, the hapless person that we would all feel got unjustly treated by the system. I don't think there are sizable numbers at all.

However, if the committee comes to that conclusion and wants to put in a safety valve, then what I am asking the committee to do is consider the impact that has and to——

Mr. MAZZOLI. Exactly.

Mr. BARR. OK.

Mr. MAZZOLI. And I think that is what—the chairman is just looking for something to put our head on. You know, I remember when I was in law school the professor said "Give the judge or the jury something—a peg to hang their hat on. Give them some reason for doing something." But I will be quite honest with you. At this point I haven't really seen the data, the hard numbers, that would indicate that there are miscarriages of justice beyond the

rare few, and we have had a couple of them, perhaps, in this room today, I don't know.

Mr. Barr, I have one other question. Yes?

Mr. BARR. You know it is interesting. The Bureau of Prisons recently went through an exercise to try to identify people who they would be willing to put back out into the community, that they would feel sufficiently comfortable to put back out into the community, and they came up with 1,600-odd people in the entire system. That suggests to me we are not talking about very many empathetic, egregious cases in the Federal system.

Mr. MAZZOLI. And then to show—and I will wind up on this point, because I remember reading something. I couldn't find it in my notes here. That study where they found just a handful of people that they would feel comfortable enough to really dump on society, which to me demolishes the myth that we have a bunch of choirboys that are in our Federal prisons.

But let me just go on to this. On July 7, 1993, in the Washington Post, what appears to be like a front page story, entitled "The Drug War Locks Up Prisons," and it devoted itself primarily to the situation in Florida. Now these statistics are used by the writer, a writer by the name of William Booth, and they are not used editorially or attributed to something. These are used by him in his writing as if they were standard fact.

Fact: 66 percent of the inmates in Federal prisons broke drug laws. Sixty-six percent of the inmates in Federal prison broke drug laws. Does that sound realistic?

Mr. BARR. I think it is about 62 percent. But that doesn't mean that they are in there just for the drug violation. They could be in there for other activity and there was a drug count as part of their conviction.

Mr. MAZZOLI. Now, let me try this on, and maybe somebody can explain this. It seems like it is very inconsistent.

In Federal prisons 70 percent of the inmates, in Federal prisons 70 percent of the inmates have no history of violence.

Mr. BARR. I don't know. The figure that I used was—it is analogous to the figure you used before, of 93 percent in the State system or either violent criminals or recidivists. The figure that I used at the Department of Justice, and it may be dated by a couple of years, was 88 percent in the Federal system.

Mr. MAZZOLI. If I were to go into a Federal prison, and there is one in Lexington, and walk in and take the first 10 people that walked in, 7 of those 10 would be choirboys?

Mr. BARR. No.

Mr. MAZZOLI. Judge Wilkins.

Judge WILKINS. Well, I don't think they would be choirboys.

Mr. MAZZOLI. What does that mean?

Judge WILKINS. And I don't know this fellow's statistics, but I do know——

Mr. MAZZOLI. Well, then I think we need statistics, my first point.

Judge WILKINS. The question that you put to us is what is the percent of Federal prisoners now in the penitentiaries throughout the country that have a prior history of violence? I assume by that you mean a prior criminal history of violence.

Mr. MAZZOLI. I would ask you.

Judge WILKINS. No. No.

Mr. MAZZOLI. You are the expert. I would like to figure out what is violence. What does that statistic mean, if it is a reputable statistic? What does violence mean in the context in which 70 percent of Federal prisoners have no history of violence?

Judge WILKINS. That is some study you just brought up. I don't know whether it is correct or not.

Mr. SCHUMER. Would the gentleman yield?

Mr. MAZZOLI. I would like to find out. I am not sure where Mr. Booth got his data.

Mr. BARR. That data is available. In fact, I recently saw a Department of Justice study and I looked at it this morning. I just can't remember off the top of my head the figure that is in there for violent offenses.

Mr. SCHUMER. A good percentage are people of white-collar crimes, embezzlements and all of that, who would almost exclusively fit into the nonviolent category. I know that. But I don't know the number either.

Mr. BARR. Correct. But that doesn't mean they are choirboys.

Mr. SCHUMER. Right. They are certainly not choirboys. Or choirgirls.

Mr. MAZZOLI. And they are also not the people the Government would feel comfortable in releasing to the streets. If they would release 1,600 to the streets, then where are the other 65,000 or 67,000 people. That means that they are nonviolent and they have done nothing.

I am really curious. These statistics appear totally contradictory, and I think until we can get to the bottom of them, and I am glad our chairman is going to ask for some clarification, we are operating really—and I will complete my statement on this. When Mr. Barr said we cannot allow mythology to draft policy, and I think that is what we could do if we are not really careful.

Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you, Mr. Mazzoli. This has been, so far, a really outstanding hearing in terms of bringing out issues. I want to thank both Judge Wilkins and Attorney General Barr, Mr. Attorney General Barr, for excellent testimony that I think helped us think on this.

So, gentlemen, we appreciate it. You have been here a long time. I was going to suggest you sit in also on the next panel, but you have done your duty.

Will the final panel come forward? And I first want to thank all of them for waiting as long as they have, and we appreciate it. We have been going on about 4 hours.

OK. Let me introduce our panel.

The Honorable Vincent Broderick is the chairman of the Committee on Criminal Law of the Judicial Conference of the United States. He continues to serve as the U.S. district judge in the Southern District of New York, a post which he has held since 1976. And before taking his New York Federal judgeship, Judge Broderick served as commissioner of the New York City Police Department. He is a distinguished person who cares a great deal about the law. We welcome you here, Judge.

Judge BRODERICK. Thank you.

Mr. SCHUMER. Tim Mullaney was supposed to be here, to provide a bit of an opposite point of view, from the National Legislative Committee of the Fraternal Order of Police, and I apologize to members. We won't have that much of a diversity of viewpoint here because he is not here. But the viewpoint has been very well represented. He is opposed to changing the law.

Mr. Neal Sonnett is the chairperson of the Criminal Justice Section of the American Bar Association. He currently works as a partner with Sonnett, Sale & Kuhn——

Mr. SONNETT. Kuhne.

Mr. SCHUMER [continuing]. Kuhne, a Miami-based law firm. Before entering private practice Mr. Sonnett served as an assistant U.S. attorney and chief of the criminal division for the Southern District of Florida.

And finally, the Honorable John Walker is a judge on the Court of Appeals for the Second Circuit, and he is the president of the Federal Judges Association. He also served as Special Counsel to the Administrative Conference of the United States and as Director of the Institute of Judicial Administration.

I want to thank all of you for coming and for waiting patiently. Your efforts are very much appreciated. We have received your prepared remarks, which will be read into the record, and each of you will have 5 minutes for your presentation. Maybe we will do, just in deference to the invisible robes, first Judge Broderick, Judge Walker, and Mr. Sonnett.

Judge Broderick.

STATEMENT OF JUDGE VINCENT L. BRODERICK, CHAIRMAN, COMMITTEE ON CRIMINAL LAW, JUDICIAL CONFERENCE OF THE UNITED STATES, WHITE PLAINS, NY

Judge BRODERICK. Thank you, Mr. Chairman, and thank you for this opportunity to appear before this committee.

I am here to express the complete and unmitigated opposition of the Federal judges of this country to mandatory minimums. We have had in effect since 1984—or at least they have been in effect since 1987; they were passed in 1984—the sentencing guidelines, and you heard earlier from Chairman Wilkins.

The sentencing guidelines were designed to get Congress out of the business of micromanaging sentencing, and I just want you to consider the whole concept of the sentencing guidelines. The concept was to structure sentences and to make that structure a close-to-binding structure. Judges would have to follow it.

The Sentencing Commission was charged with preparing sentences which were proportional one to another, which were honest sentences because parole was abolished and a large part of "good" time was abolished, and they were also to be directives, in effect, to sentencing judges. And then—and this was the most important part of all this—for the first time we had appellate review of sentences and we introduced people like my friend over here on the court of appeals, Judge Walker, who will review what we sentencing judges do.

This is a structure which I certainly concede aroused a furor in the judges' community. But I can assure you right now that so far

as I am concerned we are convinced that the Sentencing Commission is here to stay, that sentencing guidelines are here to stay, and we really ask this committee and ask this Congress to let the Sentencing Commission do what it was charged with doing.

Now, you heard Judge Wilkins, and Judge Wilkins talked about his proposal. And my committee has voted to support his proposal in principle. But you can't read the Sentencing Commission's report to Congress on mandatory minimums without concluding that the only really sensible thing to do is repeal mandatory minimums because they are upsetting everything that the Sentencing Commission is designed to do. They have removed honesty from the process. They have removed fairness from the process. They have removed proportionality from the process. And they have prevented the Sentencing Commission from making a graded relationship between various crimes and fixing the appropriate sentence for each crime.

I have pointed out in my written statement various specific examples of the unfairness of the minimums, but what I want to stress here is that the mandatory minimums are unfair because they affect people who are not covered by mandatory minimums. Judge Wilkins has told you that the guidelines are pegged so that the mandatory minimum will also be the guideline sentence. Well, that is true. But then bringing other sentences into proportion with those highly pegged mandatory minimums pulls a great many sentences up which are not in any way connected with mandatory minimums, and we have people going to prison today who should not be going to prison because they are nonviolent first-time offenders, and you, the Congress, has told the Sentencing Commission that it should make an effort to see that first-time offenders who have not committed violent crimes don't go to prison.

The Sentencing Commission is a tough group of people, and I want to tell you, gentlemen, Federal judges are tough people too and we know how to sentence people who warrant and deserve serious sentences. One of my criticisms through the years with the Sentencing Commission is that in certain respects its sentences have been too lenient, and I haven't hesitated to render a sentence above a sentencing guideline if in my judgment it was warranted and if I felt that I could give reasons for going above that guideline that would pass muster with the second circuit.

The big difference—the sea change—between now and pre-1984 is (1) the Sentencing Commission and (2) appellate review.

I want to say one more thing about this whole debate that I have heard today. I have listened to you gentlemen on the stand there talk about looking for a relief valve and talk about how bad crime is. Look, I know how bad crime is. But I also know that the Congress itself set up the Sentencing Commission after slaving over it for 10 years. It set up a system which has turned out to be a potentially great system. But it will never be great because it can never be effective unless we eliminate mandatory minimums.

Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you, Judge.

[The prepared statement of Judge Broderick follows:]

PREPARED STATEMENT OF JUDGE VINCENT L. BRODERICK, CHAIRMAN, COMMITTEE ON CRIMINAL LAW, JUDICIAL CONFERENCE OF THE UNITED STATES, WHITE PLAINS, NY

Mr. Chairman and members of the Subcommittee, my name is Vincent L. Broderick. I am the chair of the Committee on Criminal Law of the Judicial Conference. I applaud your initiative in scheduling this hearing about mandatory minimums.

We in the judiciary recognize that the ultimate decisions concerning approaches to crime in our society are public policy decisions which must be made by those in the popularly-elected legislative branch of government—the Congress. Judges do, however, see law in action on a daily basis, and we are called upon to apply that law. In my judgment, therefore, we are in a position to provide information and even opinions to the policy-makers which will assist them in coping with the critical problems they face. Please understand, therefore, that however forceful—and I hope persuasive—my presentation may be, it is offered with a complete recognition that the decisions which will prescribe policy for the future are yours and not ours to make.

I am here as an advocate, with very strong convictions. Those convictions are predicated upon my experience and that of my fellow judges, and I suggest that they warrant your thoughtful consideration as you mold public policy for the future.

I urge that no further mandatory minimum sentences be prescribed by Congress, and that those presently on the books be repealed.

The judges of every federal circuit involved with criminal sentencing have adopted resolutions opposing mandatory minimums, as has the Judicial Conference of the United States. I warrant that there is no single issue affecting the work of the federal courts with respect to which there is such unanimity: most federal judges, certainly on the district court level, and whatever their background, believe—and this is predicated upon their experience—that mandatory minimums are *the* major obstacle to the development of a fair, rational, honest and proportional federal criminal justice sentencing system.

A word about my own background. I served as a Deputy Police Commissioner in New York City in the 1950's; as Chief Assistant United States Attorney (and for a time as interim United States Attorney) in the Southern District of New York and then as Police Commissioner of the City of New York during the 1960's. I have been a United States District Judge for 17 years. I share with every member of Congress, and with my fellow judges, a deep concern for the high incidence of crime in the United States. No one has ever accused me of being "soft on crime." I did not hesitate in the days before the advent of the Sentencing Guidelines to impose a heavy sentence when I deemed it warranted. Since the Guidelines have become effective I have not hesitated to exercise my statutory power to depart upwards, when in my judgment the Guidelines-prescribed sentence was inadequate as applied to the crime before me. Nor did I, prior to the advent of the Sentencing Guidelines, hesitate to impose a sentence other than incarceration when in my judgment it was warranted.

I recognize, Mr. Chairman, that members of Congress and federal judges approach the problem of crime in our land from very different perspectives.

Members of Congress must deal from day to day with a deeply concerned citizenry which demands solutions to a complex web of violence and to a flourishing illicit drug traffic which have spread across the land. Part of the Congressional response to this macro demand has been to legislate mandatory minimums.

A judge approaches the same problems on a micro basis: whenever he or she is called upon for a sentencing decision, the criminal as an individual human being stands in the well of the court, and there are a myriad of different considerations which should go into the judge's sentencing decision—the type of crime, the victims, the background of the criminal, the prospects that the criminal may on the one hand repeat his crime or on the other hand be rehabilitated, the milieu from which the criminal comes, the past criminal record of the criminal. Some of the decisions which Congress has made make it in many cases impossible for the judge, today, fairly and honestly to perform his or her role.

In approaching this subject, I intend to focus first on the unfairness in sentencing that results from mandatory minimum sentences and some of the characteristics of the federal mandatory system that exacerbate unfairness, particularly for drug offenses. Second, as requested by the Chairman, I shall deal briefly with so-called "safety valve" relief from mandatory minimum sentences. Third, I shall suggest that mandatory minimum sentencing has resulted in a major misuse of limited federal corrections facilities. And finally, I shall discuss what I believe is both a practical and politically acceptable alternative to mandatory minimum sentencing—the United States Sentencing Commission Guidelines.

A. Mandatory Minimums Have Introduced Massive Unfairness Into the Federal Sentencing Process

Introduction

In 1984, the Congress passed the Sentencing Reform Act to create a United States Sentencing Commission charged with the responsibility to establish federal sentencing policy through a system of Guidelines and policy statements subject to review by Congress. Promulgation of the Guidelines was to trigger a shift to determinate sentencing without parole and only 15 percent good time.

Before the Sentencing Commission could even promulgate its first set of Guidelines, the Congress in 1986, and every two years thereafter until 1990, enacted additional mandatory minimum penalties, generally concentrated in the areas of drugs and violent crime. In 1986 sentencing policy regarding drug offenses was significantly altered by creating mandatory minimum sentences pegged to the weight of drugs and the mixtures or substances containing them. In essence, a single factor—the weight of the drugs plus the substance or mixture containing the drugs—would determine a minimum penalty.

Today there are more than 100 federal mandatory minimum penalties located in sixty criminal statutes. However, four of these statutes account for 94 per cent of the cases where mandatory minimum sentences have been imposed: those pertaining to manufacture and distribution of controlled substances, possession of controlled substances, importation or exportation of controlled substances, and possession of firearms during drug or violent crimes.

This body of statutory mandatory minimum prison terms and the Sentencing Commission's reaction to them set the stage for the situation that brings us to this hearing today.

At the request of the Congress, the Sentencing Commission recently completed an exhaustive study and report to Congress with respect to mandatory minimum sentences. While the tone of that report was respectful and subdued, its total impact cannot be construed otherwise than as strongly suggesting the repeal of all mandatory minimums. The reasons I and most federal judges strongly feel mandatory minimum prison terms result in massive unfairness in sentencing are fully supported by the Sentencing Commission Report and other scholarly materials readily available to this Subcommittee.

Mandatory minimums are unfair in various ways, some of them overlapping.

1. MANDATORY MINIMUMS ARE INHERENTLY UNFAIR BECAUSE THEIR APPLICATION DEPENDS, IN MOST CASES, UPON THE PRESENCE OF ONLY ONE FACTOR

There is, I submit, only one justification for a mandatory minimum sentence—and that is that the crime covered by the mandatory minimum will always warrant the sentence prescribed, no matter the circumstances of the crime or the role of the criminal. Intentional murder or treason might, under certain circumstances, meet that test; it probably also would apply to the management level drug lords, in this country and abroad, who are never found in possession of the drugs, or to the planned assassination of a law enforcement agent. None of the mandatory minimums that have been enacted in the last six years would meet the test.

The most frustrating aspect of mandatory minimum prison sentences is that they require routinely imposing long prison terms based on a single circumstance when other circumstances in the case cry out for a significantly different result. An inherent vice of mandatory minimum sentences is that they are designed for the most culpable criminal, but they capture many who are considerably less culpable and who, on any test of fairness, justice and proportionality, would not be ensnared. Proportionality is bypassed by mandatory minimum sentences. The aggravating and mitigating factors which are relied upon to fine-tune proportionality in traditional sentencing practices, including current federal Sentencing Guidelines, play no role: the same sentence is mandated for offenders with very different criminal backgrounds and whose roles differ widely one from another. They suffer from what Justice Oliver Wendell Holmes described as "delusive exactness:" they provide a single-factor test.

Even in the most compelling cases—the possession or use of a firearm—the innumerable variations of person and circumstances coupled with the wide availability of firearms and extremely broad definitions of such terms as "crime of violence" almost guarantee that this single factor cannot fairly operate as the basis for any prison term. There is no room to deal with the assault committed by an abused spouse or child. There is no place for distinguishing types of weapons, and how they are used. There is no room to distinguish the crime of passion from one involving the individual who makes a living from crime with a gun. Indeed, as the Supreme Court

recently held, there is no flexibility to ameliorate the long prison term for the individual who simply traded the gun for drugs.

Mandatory minimum sentencing makes even less sense when based on a relatively small amount of drugs in the context of a lucrative multibillion-dollar international drug market serving millions of drug-taking victims. That context is inevitably going to attract participants from all walks of life, young and old, male and female, rich and poor, citizen and alien, who play greatly varying roles in the crime. The variations are so diverse that it defies efforts to make a reasonably comprehensive list of the patently unjust sentences routinely imposed in mandatory minimum drug cases.

A few statutes prescribe mandatory minimum sentences based on past criminal record. Even here fairness and equity are defied: whether the criminal record shows a single minor drug offense years ago in college, or a series of recent convictions as part of a pattern of serious criminal behavior, the mandatory minimum fits all.

I am sure the members of this Subcommittee, as well as judges, intuitively know that, however serious the crime, there are differing levels of culpability as between the various persons engaged in that crime. Our sense of fairness compels us toward the conclusion that punishment imposed should be tailored to a personal responsibility for the crime of the defendant being sentenced. Chief Justice Rehnquist has characterized mandatory minimum sentences as "perhaps a good example of the law of unintended consequences." He noted that "there is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders—particularly for 'mules' who played only a minor role in drug distribution schemes."

The Chief Justice has also pointed out that "one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other * * *."

2. UNFAIRNESS OF QUANTITY BASED MANDATORY MINIMUM SENTENCES

Use of the amounts of drugs by weight in setting mandatory minimum sentences raises issues of fairness because the amount of drugs in the offense is more often than not totally unrelated to the role of the offender in the drug enterprise. Individuals operating at the top levels of drug enterprises routinely insulate themselves from possession of the drugs and participation in the smuggling or transfer functions of the business. It is the participants at the lower levels—those that transport, sell, or possess the drugs—that are caught with large quantities. These individuals make up the endless supply of low paid "mules," "runners" and street traders, many of them aliens. It is because we so detest the drug trade that we are enticed into focusing major resources on and resorting to long prison terms for minor—and easily replaced—participants.

3. UNFAIRNESS OF MANDATORY MINIMUM DRUG SENTENCES BASED ON WEIGHT WITHOUT REGARD FOR PURITY

To exacerbate the situation, mandatory penalty statutes based on quantity are determined without regard to purity. The weight of inert substances used to dilute the drugs or the weight of a carrier medium (the paper or sugar cube that contains LSD or the weight of a suitcase in which drugs have been ingeniously imbedded in the construction materials of the suitcase[1]) is added to the total weight of the drug to determine whether a mandatory sentence applies. A defendant in possession of a quantity of pure heroin may face a lighter sentence than another defendant in possession of a smaller quantity of heroin of substantially less purity, but more weight because of the diluting substance. Since the relation of the carrier medium to the drug increases as the drug is diluted in movement to the retail level, the unfairness of imposing automatic sentences based on amount without regard to role in the offense is compounded by failure to take purity into account.

4. UNFAIRNESS IN APPLYING CONSPIRACY PRINCIPLES TO MANDATORY MINIMUM DRUG SENTENCES

Another significant factor of unwarranted unfairness in mandatory minimum sentencing is the application of conspiracy principles to quantity-driven drug crimes. Under the Pinkerton doctrine of conspiracy, accomplices with minor roles may be held accountable for the foreseeable acts of other conspirators in furtherance of the

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[1] *United States* v. *Mahecha-Onofre*, 936 F.2d 623 (1993). One wonders about the rationality of a system that even poses such a question.

conspiracy. A low-level conspirator is subject to the same penalty as the kingpin. Thus a crew of a ship including the ship's cook was recently convicted of smuggling drugs. The cook was subject to a mandatory minimum sentence of twenty years because of the quantity of drugs on board, despite the fact that she had little knowledge of the nature of the cargo and was the sole support of her large family in Colombia. (The result was so distressing that the prosecutor agreed not to contest a motion for acquittal n.o.v.)

5. UNFAIRNESS FOR FAILURE TO TAKE ROLE IN THE OFFENSE INTO ACCOUNT IN SETTING MANDATORY MINIMUM SENTENCES

Failure to permit the sentencing judge to take into account the role of the offender in the offense, particularly for business enterprise type offenses, is probably the most central unfairness factor in mandatory minimum sentencing. Indeed, role in the offense is far more reflective than amount of drugs of the dangerousness and culpability of the individual and of his or her reward from, and level in, the criminal enterprise. It is perhaps not surprising that Congress has resorted to rather simplistic single-factor criteria for mandatory minimums rather than attempting to capture appropriate statutory "bright lines" to distinguish the various culpable levels in a complex bureaucratic, albeit criminal, business. The difficulties in drawing such bright-lined distinctions is one of the best arguments for Congress to entrust to the Sentencing Commission the task of arriving at appropriate sentences for particular offenders and offenses.

6. UNFAIRNESS IN THE OPERATION OF THE "SUBSTANTIAL ASSISTANCE" FACTOR WITH RESPECT TO MANDATORY MINIMUM SENTENCES

An ostensible purpose of mandatory minimums is to remove discretion from the sentencing process. It is axiomatic that there is no departure from a mandatory minimum under current federal law.

No departure, that is, unless the prosecutor initiates it.

Under the law a motion for a downward departure by the prosecutor must be predicated on a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." This constitutes the only statutory basis for sentencing below a prescribed mandatory minimum. Title 18 U.S.C. Sec. 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure authorize the government to move for a departure below a mandatory minimum sentence if the defendant provides substantial assistance to the government in the investigation and prosecution of another person who has committed an offense. The government (prosecutor) exclusively holds this authority. Problems of inequities arise for three reasons; the more culpable offenders have more information to bargain with than low-level offenders who may have limited contact with conspirators; there are serious inherent incentives to perjury; and prosecutors indulge a wide variety of unstructured practices with respect to substantial assistance motions.

Who is in a position to give such "substantial assistance?" Not the mule who knows nothing more about the distribution scheme than his own role, and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer. Thus—and paradoxically—the more culpable offender is in a better position to bargain information in exchange for relief from a mandatory minimum sentence than a less culpable, minor offender. There are few federal judges engaged in criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.

Moreover, the mandatory minimum penalties are so harsh, and the incentives to avoid them so compelling, that there is a real and constant danger that the "substantial assistance" in the way of testimony by the criminal is geared to his concept of the prosecutor's needs.

There is no apparent consistency or uniformity between various United States Attorney's offices in the making of "substantial assistance" motions. According to the *1992 Annual Report of the U.S. Sentencing Commission,* in 15.1 per cent of the cases sentenced during 1992 which were subject to mandatory minimums there were downward departures for "substantial assistance." However, within this composite figure there was a wide variation by judicial district. For example, in the District of Columbia 7.1 per cent of the cases received motions for substantial assistance; in the Eastern District of Pennsylvania 48.8 per cent; in the Southern District of

Ohio 26.6 per cent; in the Western District of Michigan 5.5 per cent; and in the Eastern District of New York 17.0 per cent. There were no departures for "substantial assistance" in the Eastern District of Oklahoma.

These sentencing results, affected by decisions related to prosecutorial discretion, raise concerns regarding the sentencing objectives of certainty of punishment, proportionality, and unwarranted disparity.

I paint this picture not to discount the importance to the government of cooperation on the part of major participants in the criminal enterprise. Indeed, as a former prosecutor, I can vouch for the importance of cooperation with the prosecutor of accomplices and co-conspirators in eradicating the total criminal enterprise. Incentives to promote such cooperation by holding out the prospect for favored treatment are an embedded and time honored part of the investigative and prosecutorial process. The lower level participants are no saints and certainly merit prosecution and punishment. The unfairness and source of frustration to judges comes from not applying in the mandatory minimum sentencing system an equally embedded and time honored principle: consideration of an offender's role in the offense to provide proportional penalties based on the culpable responsibility for the criminal enterprise.

7. UNFAIRNESS IN APPLICATION OF MANDATORY MINIMUM SENTENCES

The Sentencing Commission's research indicated that there has been a lack of uniform application of mandatory minimum penalties for a variety of reasons other than the manner in which the substantial assistance immunity operates, raising further questions about the "mandatory" quality of such penalties. In thirty-five per cent of the cases where the facts seemed to warrant a mandatory minimum sentence, the defendants involved pleaded guilty to statutes or crimes carrying non-mandatory minimum sentencing provisions. This phenomenon should not come as a big surprise. Studies show that mandatory minimum sentencing practices influence participants at every level in the process—the investigator, the prosecutor, the jury, and the judges—as each reacts to ameliorate broadly perceived unfairness.

8. UNFAIRNESS RELATED TO EFFECT OF MANDATORY MINIMUM SENTENCES ON SENTENCING GUIDELINES

The mandatory minimums have also had the effect of skewing onwards and upwards the sentences which the Guidelines prescribe, as the Sentencing Commission has attempted to achieve proportionality while adapting to the mandatory minimums. The Sentencing Commission has taken the position that minimum sentences mandated by statute require the Sentencing Guidelines faithfully to reflect that mandate: the Sentencing Commission has accordingly reflected those mandatory minimums at or near the lowest point of the Sentencing Guideline ranges. This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward.

The sentencing table in the Guidelines is essentially structured as a grid with the vertical axis consisting of 43 offense levels and the horizontal axis consisting of 5 criminal history categories. It has the appearance of a lattice of Guideline ranges. When an offense level has been raised because of a mandatory minimum sentence, the Commission, in order to maintain proportionality between crimes with mandatory minimums and those without such minimums, has proportionately raised in its Guidelines the offense levels for crimes not subject to mandatory minimums. As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.

B. A Safety Valve Approach to Mandatory Minimum Sentences Is Not the Answer

Mr. Chairman, I have tried to focus attention on so-called "safety valve" approaches to taking the unfairness out of mandatory minimum sentencing because I know you are particularly interested in such an approach. I know from your public statements that you sincerely hope that if we identify and deal with a relatively small number of "horror stories," the system will be fixed. I wish that I could agree that such were the case. On the contrary, Mr. Chairman, I respectfully submit that the mandatory minimum system in place is itself the "horror" story.

I would be remiss, however, not to inform this subcommittee that the Judicial Conference, fearing that it might be politically impossible to repeal the current mandatory minimum sentencing provisions outright, has taken the position that applica-

tion of "safety valve" principles is better than doing nothing at all. The Judicial Conference has not felt that it was its role to map out the appropriate boundary for a "safety valve" proposal beyond the sincere plea that any proposal should seek the maximum relief feasible from mandatory minimums. And in all candor, I believe any reasonably satisfactory "safety valve" would encounter the same political resistance as repeal and should be considered only as a last resort.

Having said that, there are a variety of approaches to mandatory minimums I have reviewed that would have varying effects to ameliorate the negative effects of mandatory minimum sentences. As I will discuss in more detail later, the preferred approach by far in the view of the judiciary is the repeal of mandatory minimum sentencing provisions in the criminal statutes to allow the U.S. Sentencing Commission to set appropriate and proportional Guidelines for federal offenses.

Obviously, there are many "safety valve" concepts that could be studied. A simple authority to the court or to the Sentencing Commission to provide for departure from mandatory minimums "in the interest of justice"—and let these institutions fill in the details—is a broad approach requiring Congress to trust non-legislative institutions to develop principled departures. Another approach would permit the Sentencing Commission or the courts to depart from mandatory minimum penalties if certain criteria are present, such as limited involvement in the offense, first-time offender, non-violent offender, lack of a recent prior criminal record, age, or any factor deemed appropriate for departure. The mandatory minimum penalty statutes themselves could be amended to meet the test I suggested above to bring the statutory criteria into conformity with the political rhetoric by making them applicable to the relatively narrow class of offenders we all agree should get the designated sentence, such as managers of drug enterprises. Drug quantities could be deleted as requisite factors for applicability of mandatory minimum sentences in favor of consideration by the court or the Sentencing Commission of defendants' roles in the offense. Provision could be made to permit the Sentencing Commission to deal effectively with the unfairness associated with consideration of the weight of drugs without regard for purity.

Judge Wilkins has placed on the table yet another concept for reconciling mandatory minimum statutes with the Guideline system.

I am sure that there are other proposals that could have some ameliorating effect on application of current mandatory minimums. I just do not believe any of them measure up to meeting the serious problems attributable to a fundamentally flawed and dysfunctional system.

C. Mandatory Minimum Sentencing Has Resulted in a Major Misuse of Limited Federal Correction Facilities

Since the Subcommittee will hear from Kathleen Hawk, Director of the Bureau of Prisons, this morning on the situation concerning the effective use of limited federal correctional facilities and the impact mandatory minimum sentences have had on those institutions, I shall comment only briefly on this subject.

It is appropriate at this time when we are examining the current system of mandatory minimums to assess whether we are making the best use of a limited resource—our facilities of incarceration—in the best manner to promote the safety and security of our people.

Mandatory minimum sentences and related distortions of the Sentencing Guidelines have institutionalized long-term incarceration as the preferred method of dealing with crime in this country, particularly drug crime. More people are warehoused in federal and state prisons than at any other time in our history. The United States has the highest per capita incarceration rate of any of the modern industrial countries. The population of the Bureau of Prisons, which was 24,500 in 1980, is approaching 80,000 after two large growth spurts: one between 1980 and 1987; the other from 1987 to the present. If trends continue as projected, by the year 2000 there will be 130,000 people in federal prison. Director Hawk attributes the initial growth from 1980 to 1987 to prosecution initiatives and increased law enforcement efforts. The second and more dramatic spurt is primarily related to changes in the sentencing structure. Such changes include mandatory minimum sentences (which preclude the use of probation as a sentencing option), Sentencing Guidelines, abolition of parole, and reduction of good-time credits. If current sentencing policies continue, the upward incarceration trend will continue unabated.

In 1986, approximately 42% of the convicted offenders were placed on probation, being supervised in the community by U.S. probation officers. In 1992 only 24% received probation, an interesting phenomenon since 51% of those sentenced that year had no prior record.

The average cost of building one prison cell is $52,000. Once a prisoner is housed in the cell, it costs an average of $20,803 a year to maintain that prisoner. In turning to prisons as a primary answer to our crime problems, we have embarked upon a prison expansion that will cost hundreds of million dollars to build and billions of dollars annually to operate. The end is not in sight unless we reassess our options for managing offenders by evaluating less costly alternatives with two goals in mind: cost to the taxpayers and safety in the community for those taxpayers.

My experience as a judge has taught me that lengthy prison terms are not always necessary. For many offenders the impact of arrest is therapeutic; for others trial and conviction have the same effect. For still others a relatively short prison term—shock incarceration—teaches a lasting lesson. I have had to sentence many people, in these past five years, to mandated minimum terms of five and ten years when I was sure that those persons would not transgress again.

There are a variety of alternative sanctions that can be safely managed in the community, ranging from low security residential correctional alternatives and home detention with electronic monitoring, to community supervision of offenders who are required to provide restitution, to submit urine tests for the detection of drug use, to perform compensatory service, and to pay fines.

I have had the great privilege, these past three years, of exercising judicial supervision over the Federal Pretrial Services Officers and Probation Officers. They constitute an extremely talented and dedicated body of men and women who can effectively control convicted criminals outside of penal facilities.

What is the cost of community-based corrections compared to the use of prisons? In the federal system, it costs an average of $6.03 per day to supervise an offender in the community. Urine surveillance and treatment adds an average of $7.89 per day and electronic monitoring adds $11.42 per day. Compare the cost of supervising an offender in the community with urine surveillance at $13.92 to imprisonment at $56.84 per day.

Cost is not, and should not be, the determining consideration. The determining consideration should be the public weal. But I submit that the public weal is best served if offenders are punished for transgression in such wise, and under such guidance, that they ultimately have the opportunity to become useful citizens. The warehousing approach of mandatory minimums makes such an approach impossible.

Our prisons should be used for those who are a threat to society, and to punish those—whether or not a threat—who deserve incarcerative punishment. The former need to be put away for a long time; the latter may need a relatively briefer term. But these are judgments which can be made by judges, subject to appellate review, applying Guidelines which will be more realistic once the shackles of mandatory minimums are undone.

D. A Practical and Politically Acceptable Alternative to Mandatory Minimum Sentences

I submit that there is both a practical and politically acceptable alternative to deal with the problems in the current mandatory minimum sentencing system crafted over the past six years—repeal the mandatory minimums and let the Sentencing Commission carry out its mandate to fashion a fair and proportional sentencing structure. The case for doing so is most compelling.

It certainly is true that the Sentencing Guideline concept was developed in large part because Congress believed that the exercise of unbridled discretion by federal district judges and the operation of the parole system had resulted in lack of certainty and unwarranted disparities between the sentences imposed and those served for similar crimes by similarly situated offenders.

In 1984, after years of consideration and debate, Congress responded to these concerns by enacting the Sentencing Reform Act, which fundamentally altered the world of sentencing. The Act abolished parole; it drastically reduced the good-time credits that can be earned by prisoners; and it created the U.S. Sentencing Commission.

In establishing the Commission, Congress contemplated that the members of the Commission, who were—or would become—experts, would develop a reasoned relationship between the sentences to be imposed for various crimes, taking into consideration various factors which would serve to augment or to decrease the ultimate sentence to be imposed. In brief, the Commission was charged with the task of establishing Sentencing Guidelines that would promote honesty and certainty, fairness and proportionality in the sentencing process: honesty and certainty by providing a prescription of the sentences generally applicable to particular crimes and a delineation of adjustments for particular circumstances; fairness by reducing unwarranted disparity while providing sufficient flexibility to individualize sentences in

unusual circumstances; and proportionality through a system that provides appropriately different sentences for criminal conduct of differing severity.

Before Guidelines amendments go into effect, they have to be submitted to Congress for a period of time to provide an opportunity for Congress to override any Guideline with which it disagrees in a process similar to implementing federal rules of procedure and the rules of evidence.

In recognition of the fact that even the Sentencing Commission itself would have difficulty micro-managing a fair and proportional sentencing system, Congress wisely authorized judges to depart from the Guidelines—up or down—where they found the existence of aggravating or mitigating circumstances "not adequately taken into consideration by the Sentencing Commission." A judge in a particular case who departs from a specified Guideline is required to state his reasons for imposing sentence outside the applicable Guideline.

A far-reaching change brought about by the Sentencing Reform Act was that whenever a trial judge departed from an applicable Guideline, the sentence imposed would be subject to appellate review—the government could appeal a sentence below and the defendant could appeal a sentence above the applicable Guideline.

Congress presumably created the Sentencing Commission and charged it with developing Guidelines, subject to Congressional oversight, to get the extremely cumbersome task of determining appropriate sentencing ranges off the Congressional agenda. Yet before the Commission even had an opportunity to present its plan, the Commission's work was disrupted and destabilized, if not demoralized, with passage of a series of statutory mandatory minimum sentences applicable to cases soon to dominate the federal criminal docket.

We all agree that a rational sentencing policy provides serious penalties for serious crimes. I am absolutely persuaded, after some seven years of experience with the Commission, that these able public servants are ready and willing to meet Congress' expectation in the complex and difficult task of providing appropriate sentences for those who perpetrate serious crimes.

I submit that these statutory mandatory minimums have been adopted without fair consideration of their effect on the mission of the Sentencing Commission and have made it impossible for the Commission to carry out its mandate. The Commission's report on statutory mandatory minimums is a plea to Congress to return to the principles contained in the Sentencing Reform Act.

Accordingly, I urge the members of this Subcommittee and all Members of Congress to join the judiciary and many organizations and individuals concerned about fair and proportional federal sentencing to support taking the shades off the Sentencing Commission and let it do the job assigned to it. When it comes to sentencing mix, let the Commission rationalize appropriate terms of imprisonment in the complex universe of factors to be considered, including the part of a firearm, amount of drugs, purity of drugs, substantial assistance, role in the offense, and conspiracy principles. Then we shall see developed a rational sentencing system.

Conclusion

In sum, on behalf of the Judicial Conference of the United States, I strongly urge the Congress for the reasons stated to repeal all current mandatory minimum sentencing provisions and thereby to free the Sentencing Commission to carry out its mandate to formulate a rational and fair sentencing structure for the federal judicial system.

I do not underestimate the difficulties you face as you confront the unfairness in current mandatory minimum sentencing and decide whether to reverse sentencing policies so recently enacted. In the final analysis, the policy decision is a matter within the responsibility and prerogative of Congress. I hope that the perspective presented here, which represents the views of the vast majority of federal judges, will be of assistance to this subcommittee and the Congress as it ponders the difficulties we are in.

Mr. Chairman, as a final and personal note, I am confident your hesitation to act would be significantly lessened if every Member of Congress could join the federal trial judges in New York, Brooklyn, Miami, Los Angeles, the District of Columbia, San Diego and other major metropolitan courts and grapple on a daily basis with treating human beings before them in such an arbitrary and unfair way. It is a depressing and demoralizing experience. I firmly believe that any reasonable person who exposes himself or herself to this system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality. In our view, the Sentencing Commission is the appropriate institution to carry out this important task. Mr. Chairman, I rest my case and leave the matter in your able hands.

Mr. SCHUMER. Judge Walker.

STATEMENT OF JUDGE JOHN M. WALKER, JR., PRESIDENT, FEDERAL JUDGES ASSOCIATION, NEW YORK, NY, AND CIRCUIT JUDGE, SECOND CIRCUIT COURT OF APPEALS

Judge WALKER. Very well. Thank you very much, Chairman Schumer, and members of the committee, for the opportunity to testify on behalf of the Federal Judges Association. Our members are 70 percent of the Nation's article III circuit and district judges. Our members have had firsthand experience with the problems created by mandatory minimum sentences.

At the outset, I want to reiterate something that Judge Broderick just said. Judges share Congress' concern with the serious problems posed to our society by drug-related and violent crimes and believe with Congress that shorter criminal sentences are not the answer. I personally come from a law enforcement background at the Treasury and Justice Departments. Our members have no desire to return to a time when Congress and the public received criminal sentencing as arbitrary, disparate and too lenient. To the contrary, it is precisely because mandatory minimum sentences are undermining Congress' sentencing goals that we oppose them.

Congress tried mandatory minimum sentencing in the 1950's and 1960's, and rejected it as unworkable in 1970. Since then critics, scholars and Congress have labored long and hard to develop and implement the sentencing guideline regime that is now in place.

The guidelines reflect Congress' intent that career criminals receive severe sentences and that criminals engaged in certain conduct, such as drug trafficking and gun crimes, receive enhanced punishments. The guidelines are also designed to ensure that sentences are predictable, uniform and proportional to the severity of the conduct and the dangerousness of the criminal.

Now, recently mandatory minimums have crept back into the system. In enacting mandatory minimums Congress wanted to narrow judicial discretion beyond the guidelines by prescribing fixed minimum sentences for certain crimes, like drug trafficking and violent offenses, and to ensure that favoritism, privilege and bias would play no role in sentencing.

In support of one mandatory minimum provision, Senator Phil Gramm stated that all like offenders would pay the same price for their crimes, no matter who your daddy is and no matter how society has done you wrong—to quote Senator Gramm. Yet mandatory minimums, in our view, are undermining predictability and uniformity in sentencing. These provisions vest virtually unfettered discretion in the hands of individual prosecutors who have become de facto sentencing judges. It is the prosecutors who decide on a case-by-case basis who will or will not be charged with mandatory minimum offenses and who will escape them through plea bargains or substantial assistance motions.

Unlike article III judges, prosecutors are free to be lenient or harsh in particular cases without publicly explaining, let alone defending, their decisions. And, in contrast to a judge's sentencing decisions, which are public, reported to the Sentencing Commission and subject to appellate review, the prosecutorial decisions are made off the record.

As a result of these decisions, a Sentencing Commission study, the 1991 study, found that about 40 percent of the eligible Federal defendants do not receive the applicable mandatory minimum sentences. This grant of broad sentencing discretion to prosecutors has contributed, in my view, to a heightened perception that influence and power still determine whether a defendant will receive a reduced sentence.

Mandatory minimum statutes are blunt instruments that are undermining goals of proportionality and sentencing. For example, with respect to drug crimes, the principal mandatory provisions are triggered only by the weight of the drug or mixture. A defendant convicted of 5 grams of crack cocaine faces a maximum penalty of 1 year in prison, while a defendant convicted of possession of 5.1 grams faces a mandatory minimum of 5 years. And the same penalties apply whether the defendant is a low-level player or a kingpin.

The result of mandatory minimums is similar sentences for offenders who play very different roles in offenses and have different criminal histories. Even more troubling is the fact that if the mandatory minimums apply, more culpable participants in criminal schemes, even the most culpable, often receive lower sentences than their subordinates.

I understand that the committee has heard from Nicole Richardson, who received a 10-year mandatory sentence for giving her boyfriend's phone number to some of his drug customers and giving directions during a car chase. I understand that was also a factor in the case. The ringleader and lieutenants of the boyfriend's drug ring each got no more than 5 years imprisonment because they, unlike Richardson, were able to provide information to the prosecution.

Richardson is not alone. Nineteen-year-old Brenda Valencia was sentenced to over 12 years solely because she drove her aunt, who couldn't drive, to a drug transaction. To add insult to injury, Valencia's sentence was increased because her aunt had a weapon.

I have submitted several letters from district judges with my prepared statement, which I ask to be read into the record, and will furnish other examples as they come in. We have been requesting these examples for the last week and we are starting to get them in, and we will supply them to the committee as we get them.

Those who support mandatory minimum sentences seek assurance that offenders who commit serious crimes will receive sentences that fit their crimes. The judges of the Federal Judges Association wholeheartedly agree with this goal. However, mandatory minimums do nothing to further Congress' goals. Usually they do not increase the sentence the judges would otherwise impose under the guidelines, as has been pointed out, in some 95 percent of the cases. And, I would simply respond that if the sentences are the same, then why have the mandatory minimums.

Yet, in a minority of cases, and we are really talking about a minority of cases here. In a minority of cases where the guidelines do make a difference from what the sentence would otherwise be, the mandatory sentences simply do not match offenders or their crimes and can lead to injustices. And because prosecutors have discretion to nullify mandatory minimums often the most serious offenders do

not feel their impact. Thus, mandatory minimums frustrate the carefully thought out guidelines sentencing regime that was enacted by Congress after years of effort.

The lesson Congress learned in the 1950's and 1960's, that mandatory minimums were not only ineffective but also counterproductive weapons in the war on crime, is even more true today.

I would be happy to answer your questions.

Mr. SCHUMER. Thank you, Judge.

[The prepared statement of Judge Walker follows:]

PREPARED STATEMENT OF JUDGE JOHN M. WALKER, JR., PRESIDENT, FEDERAL JUDGES ASSOCIATION, NEW YORK, NY, AND CIRCUIT JUDGE, SECOND COURT OF APPEALS

I thank Chairman Schumer and the members of the committee for the opportunity to testify on behalf of the Federal Judges Association, a voluntary organization composed of over 700, about 70%, of the nation's Article III circuit and district judges. As those charged with imposing and reviewing criminal sentences in the federal courts, we have first-hand experience with the problems created by the mandatory minimum sentencing provisions passed by Congress in recent years.

Judges share Congress's concern with the serious problems posed to our society by drug-related and violent crimes, as well as Congress's belief that the answer does not lie in shorter criminal sentences. Like many of my fellow judges, I have devoted a substantial portion of my career to law enforcement, first as a federal prosecutor and, immediately prior to my appointment to the federal bench, as an Assistant Secretary of the Treasury, with responsibility for the enforcement of laws against drugs and firearms by the Customs Service and the Bureau of Alcohol, Tobacco and Firearms. Judges do not oppose mandatory minimums because we favor light sentences for convicted criminals. Neither do we wish to return to a time when Congress and the public perceived criminal sentencing as arbitrary,

disparate and too lenient. To the contrary, it is precisely because mandatory minimums are undermining Congress's sentencing goals that we favor Congressional re-examination of mandatory minimums.

Congress experimented with mandatory minimums in the Boggs Acts of the 1950s.[1] Then, like today, Congress sought to assure that sentences reflected the gravity of certain types of drug crimes, and to assure that offenders received appropriate sentences. The second Boggs Act set mandatory minimum sentences of two years for a first drug trafficking offense, five for a second, and ten for a third,[2] and mandated a life sentence or the death penalty for the sale of heroin to a minor.[3] Despite the best intentions of Congress, however, the mandatory minimum scheme proved over the next decade to be inflexible and ultimately unworkable. Congress became concerned that mandatory minimums interfered with the ability of judges to make individualized sentencing decisions and "did not result in the expected overall reduction in drug law violations."[4] The Boggs Act sentences were repealed in 1970.[5]

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[1] Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 568 (1956), amending Pub. L. No. 82-255, 65 Stat. 767 (1951), repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[2] Id. at § 102(a), 70 Stat. at 568.

[3] Id. at § 107, 70 Stat. at 571.

[4] S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969).

[5] See supra note 1.

Not long afterwards, in the early 1970s, the idea that judges' sentencing decisions should be governed by a body of law, and not unfettered discretion, was developed by then-Judge Marvin Frankel and others.[6] More than a decade later, Congress enacted the Sentencing Reform Act of 1984, which established the Sentencing Guidelines regime that is currently in effect.[7] The Act reflected Congress's appropriate concern that the then-current sentencing approach vested virtually absolute discretion in the hands of sentencing judges whose decisions were for all intents and purposes unreviewable by appellate courts. Congress was distressed that similar offenders who engaged in similar crimes were in many cases receiving vastly different sentences, and that the parole system made it uncertain whether offenders would serve the time to which they were sentenced. However, the Guidelines' framers did not intend to replace the pre-Guidelines regime with rigid mandatory minimums like those Congress had rejected over a decade earlier. As one senator stated, "[a]n inflexible scheme is hardly an improvement on an arbitrary one."[8]

The Guidelines were designed to further three fundamental

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[6] See M.E. Frankel, Criminal Sentences: Law Without Order (1973); M.E. Frankel, Lawlessness in Sentencing, 41 U. Cinn. L. Rev. 1 (1972).

[7] Title II of the Comprehensive Crime Control Act of 1984, ch.2, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86 and 28 U.S.C. §§ 991-98) [hereinafter "Crime Control Act"].

[8] 121 Cong. Rec. S37,564 (statement of Sen. Tunney).

policy goals: first, to make sentences more predictable by eliminating parole and otherwise insuring that persons engaging in illegal conduct always receive appropriate punishments; second, to promote sentencing uniformity by imposing similar sentences upon similar offenders committing similar crimes; and, third, to promote proportional sentencing by imposing differing sentences dependent upon the severity of criminal conduct.[9] The Sentencing Reform Act directed the establishment of a Sentencing Commission to promulgate the Guidelines, monitor their implementation and interact with Congress as the Guidelines are updated through amendments.[10] The Act for the first time provided for meaningful appellate review of trial court sentencing decisions, thus requiring district judges to make legal determinations and factual findings for review on appeal.[11]

In sentencing a convicted defendant under the Guidelines, a judge determines the appropriate sentencing range on a sentencing grid. The range is determined by two factors: first, an offense level arrived at through examination of the defendant's conduct in relation to the charged offense, including aggravating and mitigating factors, and, second, a criminal history category

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[9] United States Sentencing Comm'n, Sentencing Manual, Ch.1., Pt.A, p.s., at 2 (1992) [hereinafter "U.S.S.G."].

[10] See 28 U.S.C. § 991.

[11] See 18 U.S.C. § 3742(a); S.E. Zipperstein, Certain Uncertainty: Appellate Review and the Sentencing Guidelines, 66 S. Cal. L. Rev. 621, 621-23 (1992).

determined through an examination of the defendant's prior criminal activities, if any.[12]

The Sentencing Commission promulgated the Guidelines and submitted them to Congress for review,[13] as it does all Guidelines amendments.[14] And, in developing Guidelines, the Commission carefully considered and implemented Congress's policy goals. Thus, the Guidelines' criminal history approach reflects Congress's intent that recidivists generally and career criminals specifically receive the most severe sentences.[15] And the offense level calculations reflect Congress's concern that criminals engaged in certain conduct, such as drug trafficking and gun crimes, receive enhanced punishments.[16] The Guidelines are also designed to insure that sentences are both uniform and proportional to the nature of the criminal and his conduct.

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[12] See U.S.S.G., supra note 9, at 288 (sentencing table). For a discussion of the mechanics of sentencing under the Guidelines, see B.M. Selya & M.R. Kipp, An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines, 67 Notre Dame L. Rev. 1, 3 (1991).

[13] See Crime Control Act, supra note 7, Sentencing Reform Act of 1984, § 235(a)(1)(B)(ii), 98 Stat. at 2031-32, as amended by Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 35(2)(2), 100 Stat. 3592, 3599 (1986).

[14] See 28 U.S.C. § 994(p).

[15] See, e.g., U.S.S.G., supra note 9, at §§ 4B1.1 (career offender guideline), 4B1.3 (criminal livelihood guideline), 4B1.4 (armed career criminal guideline).

[16] See, e.g., id. at § 2D1.1-3.5 (narcotics guidelines); id. at §§ 2D1.1(b)(1), 2D1.11(b)(1) (enhancing narcotics offense levels for weapons possession); see also id. at § 5K2.6 (policy statement concerning departures for use of weapons and dangerous instrumentalities).

Sentencing under the Guidelines takes into account such factors as the defendant's role in the offense,[17] the amount of drugs involved in a narcotics crime,[18] and whether an offender caused a serious injury.[19] The Guidelines also consider a defendant's criminal history,[20] as well as his conduct following arrest, requiring enhanced offense levels for the obstruction of justice,[21] and lowered offense levels for those offenders who accept responsibility for their crimes.[22]

The Guidelines regime was upheld by the Supreme Court in 1989,[23] and has now been fully implemented. However, at the same time that the Guidelines were enacted and coming into their own, Congress began to enact a series of mandatory minimum sentencing provisions that mirrored the scheme that Congress had previously discarded as unfair and unworkable.[24] Today, there

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[17] Id. at Ch.3, Pt.B.

[18] Id. at §§ 2D1.1(c), 2D1.11(d).

[19] See, e.g., id. at § 2D1.1(a)(2) (where defendant is convicted under enumerated provisions, considering whether death or serious bodily injury resulted from use of drugs); see also id. at § 5K2.2 (policy statement concerning departures for significant physical injuries).

[20] See id. at Ch.4.

[21] Id. at § 3C1.1.

[22] Id. at § 3E1.1.

[23] See Mistretta v. United States, 488 U.S. 361 (1989).

[24] See, e.g., Crime Control Act, supra note 7, Miscellaneous Violent Crime Amendments, ch.10, § 1005(a), 98 Stat 2028, 2138 (codified at 18 U.S.C. 924(c); mandatory five year minimum sentence for possession of gun in connection with crime of violence or drug offense, consecutive to any other sentence); id., Armed Career

are over 60 mandatory minimum sentences on the books.[23] These mandatory minimums work at cross-purposes to the Guidelines, undermining the very goals of predictability, uniformity and proportionality in sentencing that Congress sought to achieve by enacting the Sentencing Reform Act.

Predictability

In promulgating the Guidelines regime, Congress sought to promote predictability by insuring that offenders who engage in particular offenses always receive and actually serve appropriate sentences. Predictability in sentencing increases public confidence in the criminal justice system and promotes deterrence. Congress furthered this goal by eliminating parole.[24] And the Sentencing Commission created a regime designed to insure that particular offense levels are consistently applied to particular criminal conduct.

In enacting mandatory minimums, Congress sought to narrow judicial discretion by prescribing flat minimum punishments for certain crimes, like drug trafficking and violent offenses,

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Criminal Act of 1984, ch.18, § 1801, 98 Stat. at 2185 (codified at 18 U.S.C. § 924(e)(1); mandatory fifteen year minimum sentence for felon with three prior violent felony or drug convictions convicted of gun possession in violation of 18 U.S.C. § 922(g)).

[23] See United States Sentencing Comm'n, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System ii (Aug. 1991) [hereinafter "Sentencing Comm'n Report"].

[24] D.J. Freed, Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681, 1689 (1992).

without regard to the circumstances leading to their commission or any offender characteristics. Congress was trying to insure that favoritism, privilege and bias would play no role in determining what sentence a particular offender received. In supporting a mandatory minimum for the sale of drugs to minors, Senator Phil Gramm stated that all like offenders would pay the same price for their crimes no "matter who your daddy is, and no matter how society has done you wrong."[27]

However, like the mandatory minimum regime of the 1950s and 1960s before it, the mandatory minimum regime of the 1980s and 1990s has failed to function as Congress envisioned it. Rather than furthering predictability in sentencing, the reverse has occurred.

The mandatory minimum scheme vests virtually unfettered discretion in the hands of individual prosecutors. From among the offenders who qualify for mandatory minimums, prosecutors decide on a case-by-case basis who will actually receive them.

First, it is the prosecutor who decides whether to charge a defendant with a crime carrying a mandatory minimum. A 1991 Sentencing Commission study found that, in some 45% of appropriate cases, prosecutors choose not to bring charges for carrying a firearm in connection with a violent crime or drug offense,[28] a crime carrying a five year minimum.[29] Second, in

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[27] Cong. Rec. S8,888 (daily ed. June 27, 1991) (statement of Sen. Gramm.)

[28] Sentencing Comm'n Report, supra note 25, at 57.

those cases where a mandatory minimum offense is charged in the indictment, the prosecutor frequently chooses to drop the charge in connection with a plea bargain.[30] Roughly 85 to 90% of criminal cases in the federal courts are disposed of by plea bargain.[31] Finally, only the prosecutor can trigger a court's downward departure from a mandatory minimum sentence in return for a defendant's "substantial assistance" in connection with a criminal investigation.[32] What constitutes "substantial assistance" is often in the eye of the beholder.

Unlike judges' sentencing decisions, which are public and on the record, reported to the Sentencing Commission, and subject to appellate review, prosecutors' decisions are made in private. And the Sentencing Commission study found that, as a result of prosecutorial decisions, about 40% of eligible federal defendants did not receive the applicable mandatory minimum sentences.[33]

Some may say that, because large numbers of defendants fail to receive mandatory minimum sentences, the problem is less serious than critics suggest. But uneven application of mandatory minimums undercuts Congress's goals. The current

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[29] 18 U.S.C. § 924(c)(1).

[30] See Sentencing Comm'n Report, supra note 25, at 32.

[31] T. Dunworth & C.D. Weisselberg, Felony Cases and the Federal Courts: The Guidelines Experience, 66 S. Cal. L. Rev. 99, 109 (1992).

[32] See 18 U.S.C. § 3553(e); U.S.S.G., supra note 9, at § 5K1.1.

[33] See Sentencing Comm'n Report, supra note 25, at 89.

scheme turns prosecutors into de facto sentencing judges -- free to be lenient or harsh in particular cases, without explaining, let alone defending, their decisions. And this grant of broad sentencing discretion to prosecutors has inevitably contributed to a heightened perception that influence and power, "who your daddy is" -- even in a criminal organization -- still determines whether a defendant will receive a reduced sentence.

Uniformity

The Guidelines were also a response to the wide-spread concern that similarly situated defendants were receiving very different sentences for similar crimes depending on the judges that heard their cases or the parts of the country in which they were charged.[34] The Guidelines were designed to achieve uniform sentences for like offenders by requiring sentencing judges, whoever they may be and wherever located, to follow the same procedure in arriving at a sentence.[35] In sentencing defendants, judges now uniformly take into account the nature and severity of the crime of conviction, as well as any other relevant criminal conduct, the defendant's role in the offense charged,[36] and the defendant's criminal history.[37]

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[34] M.E. Frankel, Sentencing Guidelines: A Need for Creative Collaboration, 101 Yale L.J. 2043, 2044 (1992).

[35] See U.S.S.G., supra note 9, at Ch.1, Pt.A(2).

[36] Id. at Ch.3, Pt.B, intro. comment.

[37] Id. at § 1B1.1 (application instructions).

Mandatory minimum provisions thwart Congress's goal of sentencing uniformity because they are not uniformly applied. Those who have studied their application are convinced that sentencing disparities have increased along with the proliferation of mandatory minimum provisions.[38] The Sentencing Commission study found significant gender and racial disparities in the application of mandatory minimum provisions. Of those eligible to receive mandatory minimum sentences, men are more likely to receive them than women,[39] and non-whites are more likely to receive them than whites.[40]

Even if mandatory minimum provisions were uniformly applied to criminal defendants prosecuted in federal courts, we would be far from achieving the goal of sentencing uniformity. The vast majority of drug and weapons offenses falling within the ambit of federal mandatory minimums are prosecuted in state courts, resulting in different, and often far less severe, punishments. Therefore, those offenders who are sentenced under federal mandatory minimums receive strikingly different sentences from most others convicted for identical conduct.

Proportionality

Proportionality is a third congressional sentencing goal. The Guidelines created a nuanced scheme to ensure that the

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[38] See Sentencing Comm'n Report, supra note 25, at ii.

[39] See id. at 76-79.

[40] See id. at 76, 80-83.

severity of a sentence is proportional to the severity of the crime.[41] For example, the Guidelines require a judge to adjust an offense level upward or downward based upon a defendant's role in the offense of conviction.[42] Organizers and leaders receive higher sentences than minor players.[43] And factors such as gun use and injuries to victims are also considered.[44]

Mandatory minimum statutes are much blunter instruments. They fail to take into account the factors that Congress considers essential to fashioning fair and uniform sentences; and the result is similar sentences for offenders who play very different roles in offenses, and have differing criminal histories. For example, with respect to drug crimes, the principal mandatory minimum provisions are triggered only by the weight of the drug or mixture.[45] And the same penalties apply whether the defendant is a low-level player or a king-pin.

Moreover, the provisions can have a bizarre "cliff" effect whereby a defendant just above the threshold of a mandatory minimum may face a sharply higher sentence than the fortunate defendant who falls just below it.[46] For example, a defendant convicted of possession of 5.0 grams of crack cocaine faces a

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[41] See U.S.S.G., supra note 3, at 2.

[42] See id. at Ch.3, Pt.B. intro. comment.

[43] See id. at § 3B1.1.

[44] See id. at §§ 5K2.6, 5K2.2.

[45] See, e.g., 21 U.S.C. § 841(b).

[46] See Sentencing Comm'n Report, supra note 28, at 30.

maximum penalty of one year in prison, while a defendant convicted of possession of 5.1 grams faces a mandatory minimum of five years.[47]

Even more troubling is the fact that, where mandatory minimums do apply, more culpable participants in criminal schemes, even the most culpable, often receive lower sentences than their subordinates. Examples of this are rife.

One case, brought to my attention last week by the troubled sentencing judge, is emblematic of the problem.[48] Nicole Richardson's limited participation in a drug ring consisted of giving her boyfriend's phone number to some of his drug customers and directions during a car chase. The organization's ringleader and his lieutenants each received a substantial assistance motion from the prosecution in return for their cooperation. The longest sentence any of them received was five years, half as long as the otherwise applicable mandatory minimum. Richardson, by far the least culpable of those charged, was unable to assist the Government. She was the only defendant to receive the statutorily mandated ten year sentence. The sentencing judge called Richardson's mandatory sentence "a most glaring miscarriage of justice."

The Federal Judges Association is assembling further

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[47] See 21 U.S.C. § 844(a).

[48] Letter from Judge Howard, Chief U.S.D.J., S.D. Ala., to Judge Betty B. Fletcher, U.S.C.J., 9th Cir., dated July 13, 1993, re: United States v. Nicole Richardson, included in the appendix to this testimony.

examples of cases demonstrating problems arising under the mandatory minimum provisions. I include several letters from district judges setting forth such examples as an appendix to this testimony, and request permission to submit further examples to the committee in the future.

It should be noted that many low-level participants in drug organizations who off-load or transport narcotics, known as mules, are aliens who, but for their mandatory minimum sentences, could be deported after serving shorter sentences, making room in prisons -- where it costs $25,000 a year or more to house each prisoner -- for more dangerous and culpable criminals.

Conclusion

Those who support mandatory minimum sentences seek assurance that offenders who commit serious crimes will receive sentences that fit their crimes. The judges of the Federal Judges Association wholeheartedly agree with this goal. However, mandatory minimums do not further it.

In the Sentencing Guidelines, Congress enacted a system to eliminate unwarranted sentencing disparity and lenience. The Guidelines reflect Congress's view of the seriousness of drug and gun crimes, as well as Congress's goal of ensuring that career criminals receive substantial jail time. As a result, wholly apart from mandatory minimums, the days of arbitrary or overly lenient sentencing are over.

In the majority of cases, mandatory minimum statutes do not

increase the sentences that judges would otherwise impose under the Guidelines. Yet, in a minority of cases, mandatory sentences simply do not match offenders or their crimes, and can lead to injustices. And, because prosecutors have discretion to nullify mandatory minimums, the most serious offenders often do not feel their impact.

Mandatory minimums frustrate the carefully thought out Guidelines sentencing regime enacted by Congress after years of effort. Thus, the lesson Congress learned in the 1950s and 1960s -- that mandatory minimums are not only ineffective, but also counterproductive, weapons in the war on crime -- is even more true today.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
ROOM 8900, 299 EAST BROWARD BOULEVARD
FORT LAUDERDALE, FLORIDA 33301

JOSE A. GONZALEZ, JR.
JUDGE

July 23, 1993

To: Hon. John M. Walker
Hon. Betsy Fletcher

Fr: Jose A. Gonzales, Jr.

Re: Mandatory Minimum Sentences

Attached is the Judgment In A Criminal Case in United States of America v. Brenda Valencia, 91-8107-CR-Gonzales. The defendant, Brenda Valencia, was convicted of conspiracy to possess with intent to distribute, possession with intent to distribute, and distribution of at least 5 kilograms of cocaine. Pursuant to the Federal Sentencing Guidelines, Miss Valencia received a sentence of 151 months (12 years, seven months).

Miss Valencia had just turned 19 years old at the time of the crime in this case. She was not a "big time" drug dealer. There was no evidence that she was part of a large drug operation or that she had been involved in this type conduct before. It would be an overstatement to call her a "mule," as she was not even a regular courier of narcotics. The evidence at trial showed one thing and one thing only - she drove her aunt to a drug deal. One can be an active member of a crime ring by simply being the driver. Here, however, the evidence showed that Brenda Valencia's aunt asked her to drive because she herself did not drive a car. To add insult to injury, Miss Valencia's sentence was also increased because her aunt had a weapon.

Brenda Valencia was duly convicted by a 12 member jury. Guilt or innocence is not the issue here. The facts proven at trial illustrated that she was "aware" of the situation she was in. Brenda drove her aunt from their home in Miami to a buyer's home in Palm Beach County. The evidence indicated that Miss Valencia knew that a drug transaction was to occur, and she willingly participated. But that is all. She was a minimal participant in this scheme at best, and her record was otherwise unblemished.

The mandatory minimum in this case was 120 months (excluding the gun charge). The enhancement for the weapon was also mandatory. Under the old system, I would likely have given Miss Valencia three years, and then probation. Her participation was minimal, and she had no prior record. I believed then and I believe now that the sentence in this case was extremely harsh. This is an example where a mandatory minimum gave the sentencing judge no leeway to

fashion a sentence which fit the crime. To sentence a 18 year old girl to 12 1/2 years for a first offense in which she was minimally involved seems unjust.

I have attached the Judgment in this case. Please note that I felt on April 10, 1992 the same way I feel today: "Even the low-end of the guideline range is an outrage in this case."

AO 245 S (Rev. 4/90 Sheet 1 - Judgment in a Criminal Case)

United States District Court

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA
V.
BRENDA VALENCIA (02)
a/k/a Martha Gonzalez
#39588-004
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 91-8107-CR-GONZALEZ

Robert Duboff - 1925 Brickell Ave., PD-207 - Miami, FL 33129
Defendant's Attorney

THE DEFENDANT:
Ellen Cohen, AUSA

☐ pleaded guilty to count(s) N/A
☒ was found guilty on count(s) one, two & three of the indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to possess with intent to distribute at least 5 kilograms of cocaine.	10/8/91	One
21:841(a) 18:2	Possession with intent to distribute at least 5 kilograms of cocaine.	10/8/91	Two
21:841(a)(1) 18:2	Distribution of at least 5 kilograms of cocaine.	10/8/91	Three

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) N/A and is discharged as to such count(s).
☐ Count(s) N/A (is)(are) dismissed on the motion of the United States.
☒ It is ordered that the defendant shall pay a special assessment of $ 150.00, for count(s) 1, 2 & 3 of the indictment, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 592-42-9611
Defendant's Date of Birth: 8/18/72

Defendant's Mailing Address:
North Dade Detention Center
Miami, Florida

Defendant's Residence Address:
5859 West 26th Ave.
Hialeah, Fl

APR 14 1992

April 10, 1992
Date of Imposition of Sentence

Signature of Judicial Officer
Honorable Jose A. Gonzalez, Jr.
Name & Title of Judicial Officer

April 13, 1992
Date

AO 245 S (Rev. 5/85) Sheet 1 - Imprisonment

Defendant: Brenda Valencia
Case Number 91-6107-CR-JAG

Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED AND FIFTY ONE (151) MONTHS as to each counts one, two, and three of the indictment. The sentence imposed as to each count shall run concurrent one to the other for a TOTAL term of confinement of ONE HUNDRED AND FIFTY ONE (151) MONTHS.

The defendant shall receive credit for any time spent in federal custody as to this offense.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.
☐ at _____ a.m.
☐ at _____ p.m. on _____.
☐ as notified by the United States marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
☐ before 2 p.m. on _____.
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____

_____ with a certified copy of this judgment

_____
United States Marshal

By _____
Deputy Marshal

Defendant: Brenda Valencia
Case Number: 91-8107-CR-JAG

Judgment—Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

FIVE (5) YEARS as to each counts one, two & three of the indictment.

This sentence shall run concurrent, each count, one to the other,

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer

4) the defendant shall support his or her dependents and meet other family responsibilities

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: Brenda Valencia
Case Number: 91-8107-CR-JAG

Judgement—Page 1 of 1

STATEMENT OF REASONS

Defendant BRENDA VALENCIA Docket No. 91-8107-Cr-GONZALEZ

/ The court adopts the factual findings and guideline application in the presentence report.

OR

___ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: _____ Criminal History Category: _____.
Imprisonment Range: _____ months
Supervised Release Range: _____ to _____ years
Fine Range: $_____ to $_____
___ Fine is waived or is below the guideline range, because of the defendant's inability to pay.
Restitution: $_____
___ Full restitution is not ordered for the following reason(s):

___ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

/ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): From the low-end of the guideline range is an outrage in this case.

OR

The sentence departs from the guideline range:

___ upon motion of the government, as a result of defendant's substantial assistance.
___ for the following reason(s):

___ The court orders transcript of statement of reasons be attached.

DATE: April 10, 1992

U.S. DISTRICT COURT JUDGE

United States District Court
Southern District of Alabama
United States Courthouse
Alex T. Howard, Jr. 113 St. Joseph Street
Chief Judge Mobile, Alabama 36602

July 23, 1993

Honorable Betty B. Fletcher
United States Circuit Judge
Immediate Past President
Federal Judges Association
United States Courthouse
Seattle, Washington 98104

Re: Congressional Hearings on Mandatory Minimum Sentences

Dear Judge Fletcher:

In response to Judge Brotman's letter of July 21, 1993, re the above, in the NBC Dateline program approximately three weeks ago, my case of United States v. Nicole Richardson was featured as a prime example of the injustice caused by minimum, mandatory sentences in our federal courts. NBC advised that after carefully reviewing cases from all over the country, this case was the best example they could find of such injustice.

Nicole Richardson was the girlfriend of one of the members of an LSD ring operating at the University of South Alabama here in Mobile. The longest sentence received by the ringleader and his lieutenants was five years because each of them plead guilty, cooperated with the government and received downward departures from the ten-year minimum, mandatory sentence due to their substantial assistance. Nicole Richardson, who was only peripherally involved and was by far the least culpable of all those charged in this group, went to trial, was convicted and I was compelled to sentence her to the minimum, mandatory sentence of ten years. At her sentencing, I said that this was a most glaring miscarriage of justice and this statement was carried over nationwide TV by NBC.

I do not know whether my case is the best (or for that matter the worst) example of how the minimum, mandatory sentences cause injustice, but NBC felt that it was.

I am very much opposed to minimum, mandatory provisions.

Yours very truly,

Alex T. Howard Jr.

ATHjr/cac
cc: Honorable John M. Walker, Jr., USCJ

Memorandum

To: Judge Betty B. Fletcher
Immediate Past President
Federal Judges Association

cc: Judge John M. Walker
Judge Stanley Brotman

From: Edwin L. Nelson, United States District Judge
Northern District of Alabama

Date: July 22, 1993 - 4:29 pm

Subject: Congressional Hearings
Mandatory Minimum Sentences

I welcome the opportunity, through the association, to speak to someone in the Congress with regard to mandatory minimum sentences and the injustice sometimes created by them.

In April of this year I was compelled to sentence a young college student with no prior criminal record to ten years imprisonment because of the minimum sentence mandated by law. The defendant, a 21 year old black male appeared before me on April 20, 1993, for sentencing. He had earlier pled guilty to an Attempt to Possess with Intent to Distribute Cocaine Base in violation of 21 USC 846, Use of a Communication Facility in Commission of a Drug Offense in violation of 21 USC 843(b), and Possession with Intent to Distribute Cocaine Base in violation of 21 USC 841(a)(1).

The defendant, in return for promised payment of $200.00, agreed to permit another individual to send a package to his apartment via Express Mail which the defendant knew would contain cocaine. He was to have received payment when he delivered the package to another person. The package was intercepted by postal inspectors and found to contain approximately 370 grams of cocaine base. The postal inspectors removed all but 49.5 grams of crack cocaine and the package was then delivered to the defendant's address during a controlled delivery. After the defendant took possession of the package, a search warrant was executed and he was arrested.

The defendant attempted to assist investigators by contacting the person for whom the package was intended, but he was unsuccessful.

The sentencing guidelines yielded a range of 108 to 135 months but, because of the applicable mandatory minimum sentence, I was required to impose a sentence of ten years imprisonment. It is my firm conviction that the defendant's involvement in this criminal conduct was limited to the circumstances I have described. If he had been more deeply involved, this young man could have provided substantial assistance to the government and, very likely, would have benefitted from a motion for a downward departure under Guideline 5K1.1.

Instead, because his involvement was limited, he was unable to help law enforcement officers or himself. In my opinion, the sentence imposed in this case was simply unconscionable. The result will likely be that a young man who, given a reasonable response to his offense by the criminal justice system, might have become a productive and responsible citizen will instead spend eight and one-half years in prison learning how to be a criminal.

I wish you well in this endeavor to return some measure of reason and discretion to the criminal justice system in its response to problems related to controlled substances.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE
FEDERAL BUILDING
SHREVEPORT, LA 71101

300 Fannin Street, Room 3313
Phone: 318/676-3179

July 21, 1993

FAX TRANSMITTAL

To: John Walker	From: D. Walter
	Fax: 318-676-3175
Fax: 212-791-1588	Fax: 318-676-3179

Judge Betty Fletcher
Judge John Walker, Jr.

Dear Judges,

Please forgive the form of this communication and the lack of identification of the defendants and the case number. I can probably get it for you if it is important. I understand that time is of the essence, so here goes:

Three years ago, I was sitting in Pecos, Western Texas where I tried two young Mexican-Americans on cocaine charges. Both were convicted. The case involved transportation of around ten kilos of cocaine of poor quality (seems that it was around 30%). There were two guns in the car. The first defendant had been hired to transport the cocaine from California to Texas. He said he did not know the name of the man who hired him. He was to furnish his own transportation and to be paid around $5000.

The second defendant is the one that really concerns me. He was a young legal alien with a wife and two children. His income was earned as a "shade-tree" mechanic. He was approached by his friend, defendant #1, who told him that he was concerned about whether or not the car would make it to Texas. "Would the mechanic come along to keep the car running?" I think he was to be paid $1500, a small fortune to a man in his circumstances. There is no doubt that he knew of the cocaine and the guns (in fact he was driving when stopped.) As I recall it, the minimum term was 187 months! There was no one that he could squeal on, the only person he knew was convicted with him. Dammit, that is not right.

I could give you other examples, but that is the one that awakens me from time to time. The fact that that was the least that I could do furnishes no comfort.

GOOD LUCK!

Mr. SCHUMER. Mr. Sonnett.

STATEMENT OF NEAL R. SONNETT, CHAIRPERSON, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, MIAMI, FL, ACCOMPANIED BY LYNN S. BRANHAM, PROFESSOR OF LAW, THOMAS M. COOLEY LAW SCHOOL, LANSING, MI

Mr. SONNETT. Thank you, Mr. Chairman.

My colleague, Professor Lynn Branham, and I are happy to be here on behalf of the American Bar Association, and we commend the subcommittee for dealing with this critical issue which, in our view, is having a profoundly adverse effect on the American system of criminal justice.

Professor Branham is a professor of law at the Thomas Cooley Law School in Lansing, MI, and is a former chairperson of the Criminal Justice Section Sentencing and Corrections Committee. She is the author of one of the most authoritative monographs that the American Bar Association has produced in recent years, entitled "The Use of Incarceration in the United States." We will be happy to make copies available to each member of your subcommittee. I hope you will give her the opportunity to make some supplemental remarks and to answer your questions, because she is truly one of the outstanding experts in this area.

Mr. SCHUMER. What we would like to do, Mr. Sonnett, is have her here available for questions.

Mr. SONNETT. Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you.

Mr. SONNETT. That is what I was hoping.

The ABA and the opposition of the ABA to minimum mandatory sentences stems back to 1968. It was reiterated this past year when the house of delegates of the American Bar Association passed the third edition of the sentencing standards, a well-respected work that is oft quoted in cases throughout the United States, and the ABA has also identified the repeal of mandatory minimum sentences as one of its top legislative priorities for this year.

We are just part of a growing national chorus of organizations and entities and experts that have urged the repeal of minimum mandatory sentencing laws, and I just want to relate to you a coalition that at the urge of the American Bar Association has been working for several months to consider ways in which the criminal justice system might be improved. That coalition consists of 29 organizations now, including national associations of police, of sheriffs, of mayors, county commissioners, State legislatures, attorneys, judges—Judge Broderick sits on that coalition—correctional officials, and criminal justice professionals.

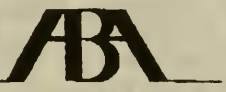
On July 26, those 28 or representatives of those 28 organizations met with Attorney General Janet Reno, presented her with a unanimously endorsed statement of principles, among which was the following statement: "Eliminate the growing use of Federal mandatory minimum sentences which result in irrationality, disparity, and discrimination in the enforcement of criminal laws and decrease certainty in sentencing."

Mr. Chairman, I dare say that there has never been a group of organizations this prestigious and this diverse representing so

many areas of the criminal justice system that has come together on consensus on this and other issues, and I would like, with your permission, Mr. Chairman, to submit for the record the letter to the Attorney General, the names of the organizations, and the statement of principles.

Mr. SCHUMER. Without objection.

[The letter and documents follow:]



MICHAEL McWILLIAMS
Office of the President
American Bar Center
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AMERICAN BAR ASSOCIATION

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Telephone: 410/752-9704
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ABA/net: MCWILLIAMSJ

July 6, 1993

The Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice
10th St. & Constitution Ave., N.W.
Washington, D.C. 20530

Dear Madam Attorney General:

Crime and criminal justice are clearly high on the public's agenda of concerns. Yet whatever one's views about the specifics of crime policy over the last decade, few would assert that it has been successful in solving this serious national problem. A group of national organizations has been meeting periodically over recent months to address how we might collectively seek to ensure that national crime policy is set in a more thoughtful, non-rhetorical fashion, removing these decisions, to the extent possible, from the pressures of day-to-day politics. (As a District Attorney in our group aptly stated it, "We shouldn't be setting crime policy based on what happened on the Six O'clock News last night.")

We hope that the policies set by this Administration in the criminal justice area will reflect the input of a broad range of organizations for whom criminal justice is a high priority, and reflect a careful examination of the appropriate federal role. We would like to work in partnership with you in addressing the very tough issues before us.

The guiding principles we envision for an effective approach to crime policy are outlined in the attached. We recognize that in many instances these statements reflect views you have already, in your tenure as Attorney General, endorsed. In those areas, we offer our assistance to you in helping ensure their implementation; in other areas, we welcome the opportunity to engage in open discussion with you and others in the Administration to share the perspective of our groups.

Respectfully yours,

J. Michael McWilliams
President
R. William Ide III
President-Elect
American Bar Association

James A. Gondles, Jr.
Executive Director
American Correctional Association

Merry Gay McMackin
President
American Jail Association

Ed Hendricks
President
American Judicature Society

Harvey M. Goldstein
President
American Probation & Parole Association

Richard B. Groskin
Liaison to the White House
American Society for Public Administration Section on Criminal Justice

James E. Copple
National Director
Community Anti-Drug Coalitions of America

Eric Sterling
President
Criminal Justice Policy Foundation

Harry Shargel
Chair
Federal Bar Association Administration of Justice Section

John Trasvina
President
Hispanic Bar Association

James J. Lawrence
President
International Association of Residential and Community Alternatives

Ellen Weber
Co-Director of National Policy
Legal Action Center

Larry E. Naake
Executive Director
National Association of Counties

Nancy Hollander
President
National Association of Criminal Defense Lawyers

Mark A. Cunniff
Executive Director
National Association of Criminal Justice Planners

George F. Moriarty, Jr.
President
National Association of Pretrial Service Agencies

Andrew Mecca
President
National Association of State Alcohol & Drug Abuse Directors

Donald E. Santarelli
Chairman
National Committee on Community Corrections

Vicki Miles-LaGrange
Chair, State/Federal Assembly Law and Justice Committee
National Conference of State Legislatures

Matthew Cassidy
President
National Consortium of TASC Programs

Lonnie A. Powers
President
National Legal Aid and Defender Association

Joseph M. Wright
Executive Director
National Organization of Black Law Enforcement Executives

Marlene A. Young
Executive Director
National Organization for Victims Assistance

Charles B. Meeks
Executive Director
National Sheriffs' Association

Chuck Wexler
Executive Director
Police Executive Research Forum

D. Alan Henry
Executive Director
Pretrial Services Resource Center

David C. Thomas
Chairman, Board of Directors
Sentencing Project

Patrick V. Murphy
Director, Police Policy Board
U.S. Conference of Mayors

NATIONAL ORGANIZATIONS SEEKING CRIMINAL JUSTICE IMPROVEMENTS

NEW DIRECTIONS FOR CRIMINAL JUSTICE

I. NEW DIRECTIONS IN CRIMINAL JUSTICE POLICIES:

- Recognize that the criminal justice system alone cannot solve the problems of crime, and that law enforcement plays an important, but limited, role in dealing with broad societal problems like drug use. Public officials and system practitioners must help to educate the public about the limitations of the criminal justice system.

- Halt the growing trend towards federalization of state crimes. Federal criminal jurisdiction should not be expanded into areas of traditional state authority unless state, local and federal officials agree that there is a clear and compelling case for an increased federal presence.

- Work in partnership with state and local officials in shaping criminal justice polices and priorities, since state and local governments bear the predominant burden of insuring public safety.

- Restore public confidence in the justice system by giving the needs of crime victims greater attention, and by eliminating racial or other bias -- or the perception of bias. Restoring confidence in the system on the part of minority communities must be a high priority.

II. NEW DIRECTIONS IN CRIMINAL JUSTICE PRIORITIES:

- Focus greater attention on the problems of violence in our society -- including more concerted crime prevention efforts targeted toward domestic violence, child abuse and the unlawful use of guns. Community-based coalitions should play a key role in this effort, but the federal government should help as well, by assisting in development, evaluation and sharing of innovative approaches.

- Make the juvenile justice system a priority. Early intervention strategies are needed to address juvenile crime. The Office of Juvenile Justice & Delinquency Prevention must be given strong, professional leadership and a stable, adequate budget.

- Support a more effective federal role in controlling gun violence in recognition of the importance of getting guns off the streets and out of the hands of teens, drug addicts, and drug dealers.

III. NEW DIRECTIONS IN SENTENCING AND CORRECTIONS:

- Support the use of community corrections for non-violent offenders. Implementation of more innovative, effective approaches to sanctioning offenders can lead to better use of limited public funds and a wiser way to prepare those offenders for return to society. Encourage examination of options such as Community Corrections Acts.

- Encourage the use of creative alternatives to incarceration which can divert non-violent, low-level first offenders from the criminal justice system into programs of treatment, rehabilitation and education.

- Eliminate the growing use of federal mandatory minimum sentences, which result in irrationality, disparity, and discrimination in the enforcement of criminal laws, and decrease certainty and deterrence in sentencing.

IV. NEW DIRECTIONS IN PLANNING AND FUNDING:

- Insure adequate and balanced funding of the justice system, including support for less "popular" components like indigent defense services. Expenditures for each segment of the system must be allocated with an understanding of how they affect the entire system. "Justice System Impact Statements" should accompany any legislation affecting the criminal justice system.

- Spend limited criminal justice resources more wisely. With all levels of government facing severe budget constraints, better efforts are needed to ensure scarce prison and jail space is available for dangerous offenders, and to limit the system's responsibilities for minor cases and cases of a civil nature that tax the resources of law enforcement, the courts, and corrections without directly affecting public safety.

- Encourage wiser allocation of national drug control resources to focus more attention on drug abuse education, prevention and treatment, rather than continuing to place primary emphasis on law enforcment.

Mr. SONNETT. Let me, if I can, just briefly summarize the major points that the ABA has made in its written testimony here today.

First, we believe that mandatory minimums produce an inflexibility and a rigidity in the imposition of punishment that is simply unfitting to a system that touts itself as a justice system.

Second, mandatory minimum sentences have proved to be ineffectual. They simply do not do what they purport to do, guarantee that a particular penalty will be imposed for a particular crime. Judge Wilkins did not mention it, but the U.S. Sentencing Commission's report in 1991 stated that 40 percent of the Federal defendants whose criminal conduct should have triggered a minimum mandatory sentencing provision escaped the effects of those provisions. The GAO testimony, which has been presented to you earlier, does not change that figure markedly.

I was struck in reading this about the results on the uniformity that I thought the Congress was after in passing both mandatory minimum sentences and the system of sentencing guidelines that in 305 of the 900 cases reviewed by the GAO the defendants were not convicted of charges carrying mandatory minimums. In 198 of those 305 cases, the charges were filed but dropped. In the remaining 107 cases no mandatory minimum charge was ever brought.

I am astounded by those figures, frankly, and while you have asked for egregious cases, and I want to talk about that whole concept of egregious cases, it strikes me that if I were a Member of Congress and I were interested in uniformity and I found out that a full third of the cases that the Congress had determined merited a minimum mandatory term in prison were not being charged by prosecutors, and the GAO says mostly because of lack of resources, some because of simply charging a threshold decision, I would be concerned.

I echo what Judge Walker has said. What has happened here under the system of mandatory minimum sentences is that the discretion that used to reside in Federal judges, the discretion that still resides in Federal judges under the system of sentencing guidelines, but if there is a downward or upward departure must be placed on the record and is subject to appellate review, has now moved into the back rooms of the U.S. attorneys' offices, and, frankly—and I say this as a former U.S. assistant attorney and as a former chief of the criminal division supervising other assistant U.S. attorneys in one of the busiest districts in the country, the Southern District of Florida—if I had my choice about where that discretion should reside, it is clear cut for me, contrary to what Mr. Barr had to say, that the discretion ought to reside with the Federal judges and that it ought to be done on the record, in the open, and subject to appellate review.

Third, Mr. Chairman, the way in which mandatory minimums are enforced has led to sentencing disparity, and of even greater concern to the ABA is that that sentencing disparity has taken on racial and ethnic overtones, and I will be happy to answer more questions about that if you wish.

Finally, the American Bar Association is concerned about the high costs of unnecessary incarceration. We urge Congress to consider not only the passage of no further mandatory minimum sentences but the repeal of existing mandatory minimum sentences

and to consider the adoption of a Comprehensive Community Corrections Act that contains the basic central components of the ABA-developed model Adult Community Corrections Act so that we can have a system of sentencing and corrections in this country that is fair, that is efficient, and that takes all of the characteristics that it should take into consideration.

I would be happy to answer any questions.

[The prepared statement of Mr. Sonnett and Ms. Branham follows:]

PREPARED STATEMENT OF NEAL R. SONNETT, CHAIRPERSON OF THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, MIAMI, FL, AND LYNN S. BRANHAM, PROFESSOR OF LAW, THOMAS M. COOLEY LAW SCHOOL, LANSING, MI

Mr. Chairman and Members of the Subcommittee:

We are pleased to appear before you today on behalf of the American Bar Association to discuss the ABA's views about mandatory minimum sentences. My name is Neal Sonnett. I am a defense attorney from Miami, Florida and chairperson of the American Bar Association Criminal Justice Section. With me today is Lynn S. Branham, a professor of law from the Thomas M. Cooley Law School in Lansing, Michigan and former chairperson of the Criminal Justice Section's Corrections and Sentencing Committee.

We would like to begin today by commending the subcommittee for its prudent decision to take a fresh look at the subject of mandatory minimum sentences, sentences which are having such a profound, and in our opinion, adverse effect on the functioning of the federal criminal justice system. We are hopeful that this examination of mandatory minimum sentences will lead Congress to take one of the critical steps needed to make the federal criminal punishment system rational, cost-effective, and truly protective of the public's safety—the repeal of mandatory minimum sentences.

The opposition of the American Bar Association to mandatory minimum sentences is longstanding, dating back to 1968. This firm opposition to mandatory minimums was reiterated in February of this year when the ABA House of Delegates approved the third edition of the ABA Standards for Criminal Justice on Sentencing Alternatives and Procedures. Standard 18-3.21(b) of those standards unequivocally states that "[a] legislature should not prescribe a minimum term of confinement for any offense."

The American Bar Association has, however, gone beyond simply stating on the record that it is opposed to mandatory minimum sentences. The ABA has gone further by identifying the repeal of mandatory minimums as a top priority of the American Bar Association. This decision was made in February of this year by the ABA Board of Governors after extensive polling of ABA entities, affiliated organizations, and state and local bar associations. The fact that the ABA, which is comprised of over 367,000 members, has selected as one of its top priorities effecting the repeal of mandatory minimums out of the hundreds of policy positions adopted by the ABA highlights the profound concern of the Association about the effects of mandatory minimums.

Just what are those concerns? Why is it not just important—but imperative—that the ill-advised practice of adopting mandatory minimums be halted and that the statutes providing for mandatory minimum sentences that are on the books now be repealed?

First, mandatory minimums produce an inflexibility and rigidity in the imposition of punishment that is unfitting to a system that touts itself as a justice system. Those of us who work in the trenches of the criminal justice system—prosecutors, judges, defense attorneys, correctional officials, and others—know only too well that criminal offenders cannot be lumped together into one all-encompassing category for criminal punishment purposes. While rules can, and in the opinion of the ABA, should be established that will generally determine the severity of the sanction or sanctions to be imposed on a criminal offender, there will always be some offenders who simply do not fit these general rules. To insist nonetheless that a statutorily mandated penalty be imposed on such offenders, regardless of the circumstances and regardless of the consequences, is to insist that the unjustness of a sentence in particular circumstances be ignored. In short, a "justice system" in which mandatory minimums play a central role simply cannot live up to its name.

This truism brings us to the American Bar Association's second concern about statutes providing for mandatory minimum sentences. They are ineffectual. They

simply do not accomplish what they purport to accomplish, and they actually aggravate the very problem of disparity in sentencing that they are designed to alleviate.

One of the superficial attractions of mandatory minimums is that they will supposedly create certainty in the punishment of certain types of criminal offenders. Individuals contemplating the commission of a crime will know in advance that if they commit the crime and are convicted, they will spend a statutorily mandated amount of time in prison. Such certainty in the penalty to be imposed for criminal conduct is supposed to deter the conduct from ever occurring in the first place.

In practice, however, statutes providing for mandatory minimum sentences are not realizing this objective. In a study completed in 1991, the United States Sentencing Commission reported that 40% of the defendants whose criminal conduct fell within the proscriptions of mandatory-minimum statutes received sentences less than the statutorily mandated penalty. The findings of this study comport with the results of other studies of mandatory minimums conducted across the nation. *See* Michael H. Tonry, *Sentencing Reform Impacts* 25–35 (National Institute of Justice 1987).

That applicable mandatory minimums are not imposed on such a high percentage of defendants is not surprising when we remember the central point that we made earlier—that the inevitable result of mandatory minimum sentences will be unjust sentences in many cases. Prosecutors, judges, and others who work in the criminal justice system who are unwilling to participate in the imposition of unjust sentences have therefore taken steps to skirt the effects of mandatory minimums. Prosecutors have, for example, charged some defendants whose criminal conduct is encompassed by a mandatory-minimum statute with an offense for which there is not a mandatory penalty.

Not only are the federal statutes providing for mandatory minimum sentences ineffective in realizing their objective of ensuring that certain criminal conduct will always lead to prescribed punishment, but, as mentioned earlier, they are also exacerbating the very problem of sentencing disparity that they were designed to avert. To understand why this is so, it is helpful to contrast mandatory minimum sentences with the sentences authorized and imposed under the federal sentencing guidelines.

In the federal guidelines system, judges who wish to impose a sentence other than the presumptive sentence under the guidelines must explain their reasons for departing from the guidelines. The exercise of their discretion occurs out in the open and is subject to appellate review. Appellate courts can ensure that sentencing judges have not abused their sentencing discretion and that they are indeed treating similar offenders similarly. By contrast, decisions designed to avoid the effects of mandatory-minimum sentencing provisions are made behind-the-scenes and are generally not subject to appellate review. Statutes requiring the imposition of mandatory minimum sentences encourage, and some might argue, necessitate the making of such decisions. But these ad hoc, seat-of-the-pants judgments that are insulated from public view in turn lead to the dissimilar punishment of similar offenders, directly contrary to the intent of mandatory-minimum statutes and the federal sentencing guidelines—and the tenets of any sound, equitable, and rational sentencing system.

This sentencing disparity is by itself a concern to the American Bar Association. But it is of even greater concern to the ABA because of the considerable evidence that mandatory minimum sentences are being enforced in a racially and ethnically disparate fashion. Studies by both the United States Sentencing Commission and the Federal Judicial Center have revealed that white defendants whose criminal conduct falls within the scope of mandatory minimum statutes are much more likely than African-American defendants and Hispanic defendants to avoid application of mandatory minimum penalties. In a nation in which the achievement of racial justice is not only a goal but a necessity, these statistics about the effects of mandatory minimums are not only disconcerting but alarming.

A final concern of the American Bar Association's about mandatory minimums that we wish to highlight today is their costs. We have already alluded to some of these costs. Whenever an unjust sentence is imposed in a case, there is a cost—not only a cost to the individual who will serve the sentence but to the society that condones a wrongful sentence. There is also a cost whenever the severity of a sentence is due to the color of a man's skin and not the culpability of his conduct. But beyond these costs, there are other costs for which, if mandatory minimums are to remain in effect, we must be held accountable.

First, and most obviously, there are the financial costs of mandatory minimums, costs which have proven to be enormous for federal taxpayers. Because of mandatory minimum sentencing provisions, many offenders, particularly drug offenders, who would previously have been punished in the community for their criminal con-

duct are now being incarcerated in federal prisons. The average cost in 1991 of keeping just one of these individuals in prison was at least $20,072 a year. Put in other terms, since the average American taxpayer pays $3,691 a year in federal income taxes according to 1991 figures, paying the bill to keep one of these individuals serving a mandatory minimum sentence in prison for one year consumes every penny of the taxes paid by over five taxpayers. What this means, of course, is that none of the money paid by these taxpayers to the federal government can be used for health care, education, environmental protection, or any of the other programs and services provided by the federal government; nor can the money be used to reduce the federal deficit. And these figures on the money being siphoned off to pay for incarceration do not include the billions of additional taxpayer dollars that the federal government has expended and, in the absence of sentencing reform, will expend in the future to build prisons to house the ever-increasing number of federal prisoners, many of whom are serving mandatory minimum sentences.

The financial blow to American taxpayers caused by mandatory minimums might be shrugged off as the unavoidable cost of having a criminal punishment system were it not for the fact that effective punishments that are cheaper than incarceration can, with proper authorization and support from Congress, be constructed for many of the offenders subject now to mandatory minimum sentencing provisions. One of the central components of the new sentencing standards adopted by the ABA is the recommendation that each legislature, whether at the state or federal level, enact a comprehensive community corrections act. Standard 18–2.2(c) of the sentencing standards specifically cites the ABA-developed Model Adult Community Corrections Act as an example of the type of comprehensive community corrections act that should be in effect in each jurisdiction.

We should note that the Model Act sets forth a state/local community corrections model and would have to be contoured somewhat to fit the structure and operations of the federal government. Most of the essential features of the Model Act, however, are applicable to a federal as well as a state criminal punishment system. One of those features provides for the establishment of a wide variety of community-based sanctions to match the wide variety of criminal behavior. The Act also sets forth critical requirements that must be met for community corrections acts and the programs established under them to be effectual. Most significantly, however, when considering the subject that is before this subcommittee today, the Act establishes the presumption that a community-based sanction is the appropriate penalty for nonviolent felons. This presumption is, appropriately, a rebuttable one. But a central message of the Model Act remains: many of the offenders on whom mandatory minimum sentences must now be imposed can be effectively, and if need be, forcefully punished in the community at less cost to American taxpayers.

It is important to underscore here that the American Bar Association shares the concern of the public and Members of Congress that violent and dangerous offenders are kept off the streets and imprisoned, sometimes for long periods of time. Protecting the public's safety obviously is and must continue to be a central goal of the criminal justice system. But the goal of protecting the public through incarceration from violent, predatory offenders can and is being met through the federal guidelines themselves. The United States Sentencing Commission has carefully reviewed individual offenses and pegged offense levels to ensure that violent criminals are given serious time behind bars. A general repeal of statutes providing for mandatory-minimum sentences will not, therefore, in any way compromise the public's safety and may, in fact, as we discuss subsequently, reduce risks to the public safety posed by the application of mandatory minimum sentences to nonviolent offenders.

There are other costs of mandatory minimum sentences that should not be ignored. There is the human toll that attends unnecessary incarceration or incarceration for an unnecessarily lengthy period of time. While convicted criminals do not engender a great deal of sympathy from others, particularly from those of us who have been victimized by crime, the debilitating effects on offenders of what we are talking about here—*unnecessary* incarceration or length of incarceration—and the emotional suffering of their families from whom they will be separated for years cannot and should not be cavalierly dismissed.

Also to be taken into account is the severe crowding in the federal prisons caused in part by mandatory minimums. The size of the federal prison population has, as you know, exploded in recent years. The Federal Bureau of Prisons today houses over 86,000 people, almost three times as many as it did ten years ago. As a result, federal prisons are, despite a massive construction program, bursting at the seams, and there is no end in sight to the problem of finding room for these prisoners. If there are no changes in current laws and policy, the size of the federal prison population is projected to escalate to 106,000 by 1997 and to over 130,000 by the year 2000. Because of the crowding caused by this enormous growth in the federal prison

population, federal prisons are becoming more difficult to manage. In addition, the programs that might facilitate the successful reintegration of at least some inmates into the community, such as substance-abuse treatment programs, are increasingly unavailable for the burgeoning number of inmates with these program needs.

Finally, we must be mindful of the risk that one cost of mandatory minimum sentencing provisions, particularly when applied to nonviolent offenders, may be endangerment of the public. Studies have shown that the recidivism rates of prisoners after their release from prison are higher than the recidivism rates of offenders with matching crimes and backgrounds who are punished in the community. *See, e.g.,* Joan Petersilia, Susan Turner, & Joyce Peterson, *Prison* v. *Probation in California: Implications for Crime and Offender Recidivism* (The RAND Corporation 1986). The reason for the higher recidivism rates of released prisoners is not yet clear. The higher recidivism rates may be due to the fact that inmates' experiences while in prison inculcate or solidify antisocial attitudes. Or they may be due to the fact that ex-prisoners are rejected by society upon their release from prison and turn to a life of crime to meet their needs. Whatever the reason for the higher recidivism rates of released prisoners uncovered in these studies, they counsel us to examine critically claims that mandatory minimums somehow enhance public safety and to take great care to ensure that the criminal justice policies we adopt do not exacerbate the very problems they are designed to redress.

Let us then capsulize for you the views of the American Bar Association about mandatory minimum sentences. Statutes providing for mandatory minimum sentences often produce sentences that are unjust. Mandatory minimum sentences are ineffectual, failing to provide the certainty in punishment that they purport to provide. Mandatory minimum sentences cause disparity in sentencing, and African-Americans and Hispanics disproportionately feel the impact of this disparity. Mandatory minimum sentences are extremely costly, and their imposition may in some instances actually endanger the public. With mandatory minimum sentences being unjust, ineffective, and enormously costly, we can no longer as a nation afford to stay the misdirected course of including them in our criminal punishment systems. On behalf of the American Bar Association, we therefore strongly urge the members of this subcommittee and other members of Congress to take the steps needed to halt the adoption of additional mandatory minimum sentencing provisions in the future and to repeal those presently in effect. It would be the privilege and pleasure of the American Bar Association to assist Congress in any way that it can in these endeavors.

We would now be happy to answer any questions you might have.

Mr. SCHUMER. Thank you, Mr. Sonnett. I want to thank all three of you for your testimony.

I would just make one point. With all due respect, Mr. Sonnett, what I am looking for—and I can't speak for anyone else—are the facts here, not the broad list of organizations, that are erudite and respected and I respect them, who are for change. We want to get away from the view that this is a turf war. We are trying to do what is best for the whole system, and we have to look at the facts, not at who is for what.

So let me try to ask all three of you to focus in on those facts, if we could.

Judge BRODERICK. Mr. Chairman, would you define what you mean by "facts"? Every one of us every time——

Mr. SCHUMER. Judge, if I might, I have tried to do that all morning. For instance—I'll give you an example—Mr. Sonnett talked about racial and ethnic discrimination. I have heard that charge bandied about. So we looked at the facts, who was actually subject to these and in what way, and the facts don't bear out that there is racial or ethnic discrimination.

We heard that it is all crack and crack gets a disproportionate amount. I looked at the facts, and the facts don't determine that.

We heard that there were so many egregious cases. I asked and searched near and wide. I didn't find those cases and so——

Judge BRODERICK. Mr. Chairman——

Mr. SCHUMER. If I might, Judge—and I will give you a fair chance to answer—what I am trying to get at here is, I see that there were four possible reasons to change, to eliminate, or get rid of mandatory minimums, OK? And let me go over them, and then you try to rebut those so you can help me come to your point of view, if you can.

One, that there are many, many cases where people got what I call egregious sentences, ones that cry out for justice, not that a mule—you know, someone carrying a lot of crack—got 2 years or 3 years—got 5 years instead of 2 or 3, but the things we have heard about under the Rockefeller drug laws, that someone who had a marijuana cigarette in their pocket got 5 or 10 years. To me, that would move me, and that is why we brought those two cases, one of which Judge Walker mentioned.

I haven't heard very many of those, although I look forward to Judge Walker sending in other ones that are like that.

Judge WALKER. I can give you two more right now.

Mr. SCHUMER. OK, I'll hear that.

The second point was, many have said, although I haven't heard it here said, that it creates problems, basically of resources, in the Federal criminal justice prison system, that we are letting out—the thing the gentleman from Kentucky talked about—that we are letting out violent criminals and, in place, we are putting nonviolent drug offenders in.

The evidence seems clear to me. On that one, I am pretty convinced that that is not happening in the Federal system. As I said, I can't speak for the State systems.

The third is a lack of flexibility, and here we are getting a little closer. But, to me, the lack of flexibility is measured not by how long the sentence is but how broad the range is, and a minimum mandatory, as Judge Wilkins himself said, doesn't interfere with that flexibility, it simply bumps it up. So if the minimum mandatory—if originally the guidelines called for an average case having 36 months and an egregious case having, let's say, 5 years, and an ameliorating case, a mitigating case, to have 18 months, if Congress says they think the minimum mandatory ought to be 5 years, you can still have the same range of flexibility although longer periods of incarceration in prison.

So that is another argument, but it just intellectually doesn't wash with me. Then we are arguing about length of sentence as opposed to flexibility of sentence because the minimum mandatory isn't a mandatory, it is a minimum mandatory, which is different in terms of flexibility.

Finally, Mr. Sonnett made this argument—and, really, he is the first to make it, although I think either both of you or one of you touched on it—that if there is going to be discretion—oh, another one was that the prosecutor has enormous discretion. It seems to me the prosecutor has had that discretion from the year one; preindictment flexibility, whether there are minimum mandatories or not, is in the prosecutor's pocket. No one has ever found a way to deal with that because you have to have complete discretion with the prosecutor. So whether there is a minimum mandatory or not, a prosecutor could choose to indict for a high-level crime under the guidelines or a low-level crime under the guidelines. I have

heard no one suggest changing that. I don't know a way to change that. So the 305 cases, Mr. Sonnett, don't wash with me. Those could occur whether there are mandatory minimums or not.

Mr. SONNETT. Except that they show, Mr. Chairman—I'm sorry, I didn't mean to interrupt.

Mr. SCHUMER. No, no, no. That is OK. Go ahead and make that point.

Mr. SONNETT. They show that minimum mandatories don't work.

May I suggest another question that ought to be asked, another category?

Mr. SCHUMER. Let me just get this out and let Judge Broderick respond.

So the only argument that I have heard that at least seems to me to have some wash here, it is not egregious because those I haven't found the cases, it is not overcrowding or missed resources because in the Federal prison system that doesn't seem to be the case, it is not lack of leverage because you can adjust the guidelines up or down with mandatory minimums working, and it is not prosecutorial discretion because that existed long before the guidelines were put into effect, or minimum mandatories were put into effect, and will whether we abolish them or not.

The only one that I have heard is that it is better to have the flexibility done in the public—Mr. Sonnett made this argument, and it is one that I have to consider, I think—it is better to have the flexibility done in the post-indictment light of day, if you will, because court proceedings are public, rather than the preindictment deals that are made in the prosecutor's office, which obviously are not public. There is a big tradeoff the other way, and I think that is what most of my colleagues have been talking about.

So I tried to assemble here a panel of distinguished people—no fall guys, the three of you—to rebut those kinds of arguments that, as I mentioned in my opening statement, when I first came to this issue I felt a little more strongly on your side than I do now, because the facts just don't seem to bear it out to me.

Now it's your nickel. Go ahead.

Judge BRODERICK. Let me start off by saying you left out the principal argument which I have made in my papers, and that is that mandatory minimums are unfair, and they are unfair in a number of different ways. They are unfair because they turn on a single factor.

A mandatory minimum should be in place if, and only if, the crime it pertains to is going to call for that sentence for every single defendant charged with that crime. That is the only possible basis on which a mandatory minimum——

Mr. SCHUMER. Only if you add the words "at least that sentence," not "that sentence," only "at least that sentence."

Judge BRODERICK. I'll add "at least."

Mr. SCHUMER. OK.

Judge BRODERICK. I'll add "at least." I'll add "at least."

But you take this one factor, and under the mandatory minimum scheme you close off any argument that there are mitigating factors which should or may be considered. The only way the judge can go is from that minimum up. He can consider aggravating factors but not mitigating factors.

Now I'm not arguing this from the point of view of the judge, and the one thing that I have felt was sort of missing from this whole discussion today is a realization on the part of you gentlemen up there that every time a judge has somebody before him for sentencing, that is a human being. There is a crime, and there are victims, and the judge must consider that, but he also has to consider that this is a human being he is sentencing, and you don't warehouse human beings unless that is the only thing that should be done to human beings.

Mandatory minimums are unfair because they are based on quantity, and quantity is no way to run a railroad in the sentencing area.

I have seen so many cases involving money where the sentencing guidelines, in my judgment, were inadequate because they were based on the quantity of money involved. A man goes into a bank and holds up the bank. If he takes $100 or if he takes $100,000, that is pure happenstance. The crime is going in there and threatening human beings. The same way, in the drug area, I don't see how quantity should be the driving force here. You don't consider the man's role in the offense, you don't consider how he got into it.

Now people can get into a crime and be guilty—be guilty, and they should go to prison. They should go to prison. But you say when you set a mandatory minimum that they should go to prison for 5 years or for 10 years depending on how much is involved, and I say that is unfair.

You say that weight should be considered without regard to purity, and the law does say that. The law says you consider the mixture or the substance, and all there has to be is a trace of heroin or cocaine in there. You weigh the mixture or the substance containing that.

Now everybody who has ever been involved with the criminal justice system knows that the purity of any drug—the purity of cocaine, the purity of heroin—decreases as it comes down to the retail level, and so we have the situation where, if you found one of the people running the drug crime with a highly pure, 92 percent, kilogram, and then you find somebody down at the bottom of the totem pole with much more but much less heroin in it, the man down there is going to get a much greater sentence. That is not fair.

The substantial assistance, again—you are right, Mr. Chairman, the prosecutor has always had and always should have a great deal of discretion in when to charge and how to charge, but what we have in this substantial assistance area is that we are moving the discretion of the prosecutor from the charging area to the sentencing area, and never until now has the prosecutor had such a substantial role in sentencing.

And I did mention in my earlier testimony the effect that mandatory minimums have on other crimes and other defendants because they have moved up all sentences for nonmandatory minimum crimes.

Mr. SCHUMER. Mr. Sonnett, or Judge Walker,

Mr. SONNETT. I always defer to Federal judges, Mr. Chairman.

Judge WALKER. My point is that when you have a guideline system in place, that is mandatory in the sense that the judges are required to follow the guidelines; that is the law, and it is subject to appellate review. I must say that our caseload has increased by about 25 percent in guideline appeals. So you have a system where arbitrary sentencing just cannot exist, independently of the mandatory minimums.

In other words, it is not a question of abolishing mandatory minimums and going back to what the perception was in the seventies, because all of those concerns are dealt with by the guidelines, and the guidelines—which have a body of expertise behind them through the Sentencing Commission as to which every sentence is imposed and then a report is sent to the Sentencing Commission, and from there there is appellate review—they provide all of the safeguards that are necessary, in our view.

In addition, Congress has a chance to review directly what happens in sentencing under these circumstances. In a situation where the prosecutors are taking 40 percent of the cases out of the applicable mandatory minimum and dealing with them some other way, that review is lost. That review is lost by your committee. Your committee has access, as Chairman Wilkins pointed out, to the Sentencing Commission for facts, and therefore we have an open system that seems to function well at the present time. It is functioning better and better as we get more familiarity with it. Why have mandatory minimums?

The other point that was made earlier in the hearings was that in some 95 percent of the cases, the sentence under the guidelines would be either the same or even higher. If that is the case, rather than saying, well, there is no problem with the mandatory minimums, I say why have the mandatory minimums? The guidelines handle those cases.

In the other cases, the 5 percent, those are the ones that have to be looked at very closely to see if there are problems being created by the mandatory minimums, and that is what the debate should be about. That is where the difficult sentences are and the cases that, in our view, are unjust.

Mr. SCHUMER. Judge, if I might interrupt you just for a minute, I tend to agree with you about that. It seems to me that if that is the case, although—you know, you can argue—I mean what Judge Broderick said is, it pushes all the other sentences up. That is probably the will of this Congress and the people, to push all the sentences up and to make them longer, and, of course, in the case that he brought up in terms of purity, you can certainly give the guy at the top of the organization greater than the mandatory minimum, and they get it. In the 10-year cases, I think Judge Wilkins said, it goes an average of 16 years.

But my point to you is this—and I would be interested in the other gentlemen's and ladies' answer, too—if it is just 5 percent of the cases and we are not here under a plan to reduce the average amount of sentencing but, rather, just to make it work better, what is your view of a sort of separate safety valve type of proposal? Which, in my judgment, by the way—and I think my judgment is right on this—is about the only chance you have of getting anything done here.

Mr. EDWARDS. Mr. Chairman.

Mr. SCHUMER. I will be happy to yield to Mr. Edwards.

Mr. EDWARDS. Mr. Chairman, may I interrupt for a minute? I'm sorry, I have to go, I have a previous commitment.

Mr. SCHUMER. Do you want to ask a few questions?

Mr. EDWARDS. No, I don't have time.

As you might guess, I have no questions of these witnesses. These witnesses, I think, made my case, as a matter of fact, the three male Solomons and a woman Solomon up there.

So thank you very much. I deeply appreciate your coming here today.

Mr. SCHUMER. And thank you, Mr. Edwards.

Mr. Edwards is regarded as one of the consciences of the whole body, and whether we agree with him or not—I agree with him more often than not, but not this time—we appreciate your interest and your being here, Don. Thank you.

Mr. EDWARDS. Thank you.

Judge WALKER. Mr. Chairman, if I could just respond to your point.

Mr. SCHUMER. Please.

Judge WALKER. On the idea of a safety valve, the problem would be in the drafting of it, because a safety valve, again, is a broad brush application that is supposed to apply across the board, and there will be problems even in applying the safety valve; there will be problems in the details, as you know, often, from drafting legislation. At some point, there has to be given a certain amount of discretion to the sentencing authorities, and in the case of a safety valve what Chairman Wilkins suggested was a safety valve that is already built into the guidelines system: Role in the offense, acceptance of responsibility. Those are two key factors. One could add to that first-time offender.

That kind of safety valve which permits downward adjustments from the applicable sentencing guideline could be made applicable, obviously, to the mandatory minimum, and, to that extent, it seems to me that his proposal contains safety valves.

Mr. SCHUMER. Can I just ask—and I want to give Mr. Sonnett his shot here, and then I'm finished—but, Mr. Walker, has your organization taken a position on the sentencing guidelines? Do you support them now? Does your organization?

Judge WALKER. We are not opposing the sentencing guidelines at all.

Mr. SCHUMER. But have you taken a position ever in support or opposition?

Judge WALKER. Originally we took a position—the judges did before I was involved in their leadership—opposing them, but that position is not the position of the——

Mr. SCHUMER. Has it been overruled in any way by you? Have you taken a vote retracting your opposition?

Judge WALKER. We actually haven't taken a formal vote, but I think if we were to poll the members——

Mr. SCHUMER. Please, I would be interested.

Judge WALKER [continuing]. It is one of those issues where there might be a minority of judges now who would want to have them abolished, but it is an issue that may be dividing the agency, and

I really think the commonsense approach and the right approach is to recognize that the guidelines are here to stay and welcome them and see if we can make them work as well as possible.

Mr. MAZZOLI. Mr. Chairman, if I might interrupt just a half a second.

Mr. SCHUMER. Mr. Mazzoli.

Mr. MAZZOLI. I think that is what is driving this whole thing. The gentleman from New York, our chairman, talked about turf battles. These are long-time enmities between you and the prosecutors and the defense lawyers, and I couldn't help but notice, in a Post story about Attorney General Reno's decision to order changes or examination of sentencing as well as charging policies, the hosannahs were rendered by a gentleman by the name of Keith Stroop, the executive director of the National Criminal Defense Lawyers Group. So obviously he sees in a change in mandatory minimums some opportunity to get some of his clients off the hook.

Anyway, I would say that I think in answer to the gentleman's question, if the judges were to issue an edict saying that they were wrong or that, upon reflection, they are now for sentencing guidelines, it would certainly help those of us who are now being importuned to make changes in mandatory minimums to say that all that has been set aside, the judges now realize they are not going to get back the discretion that they seem to want to have. I mean it would help us.

Mr. SCHIFF. Would the gentleman yield?

Mr. SCHUMER. Why don't we let Mr. Schiff say something, then Mr. Sonnett to answer. I am finished asking questions—oh, no, I have one more.

Go ahead, Mr. Schiff.

Mr. SCHIFF. Certainly I think Mr. Sonnett should be allowed to respond, but I think on the point that the chairman raised and Congressman Mazzoli raised, I said to you earlier as a joke, Mr. Chairman, but something less than a joke, there is one obvious benefit from mandatory minimum sentencing: The judges have stopped coming here complaining about sentencing guidelines. We can take it from there.

Mr. Chairman, I yield back.

Judge BRODERICK. On a point of privilege, the Judicial Conference has never opposed sentencing guidelines, and we have dealt on a continuing basis for the last 5 years rather aggressively with the Sentencing Commission, and I think that they realize that we are here to stay and we realize that they are here to stay.

Mr. SCHUMER. Thank you, Judge.

Mr. Sonnett.

Mr. SONNETT. As a defense lawyer, I think it is important to respond to what Mr. Mazzoli has said in several ways. First of all, I can't be responsible for who the Washington Post calls for a quote; but, second of all, I have talked to literally dozens and dozens of people in law enforcement and in prosecution around the country, because I travel a good bit around the country, and the same remarks that you mentioned Mr. Stropp made to the Washington Post have been made to me and have been made publicly by people who are in law enforcement.

I think it is a bit unfair, if you don't mind my saying so, Mr. Mazzoli, to say that defense lawyers would applaud this because it might get their clients off the hook. I have a family, I have a son, I'm a former prosecutor, I decry crime and drugs just as much as anybody else in this room does, and I want to make sure that people who commit crimes are punished, and severely if they need be punished severely, and that our criminal justice system works.

Mr. MAZZOLI. And you say that the system is not working?

Mr. SONNETT. Well, you know, I think we need to take a good hard look at this.

Mr. Schumer, I was about to say to you I have another test that I would like for you to consider.

Mr. SCHUMER. Go ahead, please.

Mr. SONNETT. For the last 10 years, every 2 years the Congress has passed laws which have increased the sentences, mandatory minimum sentences, except for last year when the conference report didn't get out.

Mr. SCHUMER. Not for lack of trying.

Mr. SONNETT. Not for lack of trying; I understand that. But every year, the will of the Congress, as you mentioned it before, Mr. Chairman, was that there be longer and longer sentences. We now have a criminal justice system that is on a fast track to collapse, and it has not made an appreciable dent in the crime or drug problem in this country. So sure, it hasn't worked. What we have done is, we have begun to devote more and more of our resources to the back end of the system.

We now spend more of our criminal justice dollars on the corrections system than we spend on policing, on prevention, on education, on treatment, and on the ports, and I have got the statistics in my briefcase if you want to see them. More and more are going to the corrections end, less and less to the policing and the prevention end. We are spending more and more money on drugs and less and less money on violent criminals. Now that is primarily a State problem, I agree with you.

Mr. MAZZOLI. If my chairman would indulge me just for 30 more seconds—I have to leave also; I have an appointment—I decried the fact that the administration, which I helped elect, has cut $231 million out of the program that Dr. Lee Brown, the Director of the National Drug Control Policy, runs. And that is not the back end of the system, his program would involve education and drug treatment. I don't think it is an either/or proposition. We frame this thing very apocalyptically: Either we do this or we are not going to do that. We can do them both.

I think we ought to be tough as hell on the criminal, expand the prisons, be as tough as we can be with mandatory minimums, except as the chairman can fashion some kind of an escape valve for the egregious cases, and at the same time put real money into education, real money into treatment, real money into the prison settings, and I think the gentleman has talked about that, that they have antidrug programs in the prison setting.

Mr. SCHUMER. That also got lost in the crime bill.

Mr. SONNETT. But if mandatory minimum sentences worked, we would have seen some advantage to them.

Mr. MAZZOLI. Only if you have a comprehensive solution, but just we shouldn't reduce one in order to put money on the other side.

Mr. SCHUMER. If the gentleman would yield, that is, in all due respect, an unscientific statement. You would have to find out if things were worse or better without mandatory minimums sentences. We have had an increase in the crack cocaine from 1984 on. Who knows? Perhaps things would be considerably worse without them. You know, there is no way to judge. Just because things aren't what we want them to be doesn't mean that any given law—you could say the money we have put into treatment hasn't worked. So that is not a fair statement.

Mr. SONNETT. I understand, but one thing that we tend to forget is that almost everybody that we put in Federal prisons is going to come out, and I have had on-the-line experience in representing and prosecuting people for the last 26 years, and I can tell you a couple of things, and maybe it is anecdotal, but I think we can find studies that will back it up.

When you take nonviolent, first-time offenders—and, depending on how you define first-time offenders, you may be talking about, as Judge Wilkins said, 34 percent of the population, not just that 3,000 that the GAO quoted—and you place them in jail, many of them for mandatory minimum sentences, when they could be diverted into community corrections and they could be diverted into programs of treatment or prevention and education, what you are going to do in a large majority of those cases, Mr. Chairman, is, they are going to come out 5 or 6 or 7 years later not only more bitter but better criminals, and they are not going to be able to get reintegrated into society. Now that is what has been happening, and that is why we have such a startling recidivism rate.

Mr. SCHUMER. No, it isn't.

Mr. SONNETT. Janet Reno talked——

Mr. SCHUMER. Mr. Sonnett, there are lots of people who never go into jail and commit 30 or 40 crimes in a month.

Mr. SONNETT. Now we are comparing oranges and apples.

Mr. SCHUMER. Mr. Sonnett, I have to tell you, you are glibly stating these things. They may or may not be true, OK? Maybe that person who comes out—let's assume, arguendo, that person you are talking about comes out a worse criminal. How many crimes would he or she have committed in the 5 or 6 or 7 years that they weren't in prison?

Mr. SONNETT. Well, but let me ask——

Mr. SCHUMER. But, you see, look, I'm only 42 years old, but I have been through one cycle of this, and the cycle when we didn't have either sentencing guidelines or minimum mandatories, and I sat in my neighborhood as an assemblyman and watched criminals commit crime after crime after crime and they weren't sentenced to a day in jail, not because of the malice of the judges—these were local—but because the system was so darn overloaded. I would pledge to my constituents and to myself, I'm never going to go back to that again. That was worse, and that is what brought about the push for both sentencing guidelines, which are a reform of minimum mandatories, a more flexible form but a form because you can't go below a certain amount, and the mandatories themselves, and let's not—well, you may wish to, and I don't think you do.

Mr. SONNETT. No, I don't.

Mr. SCHUMER. But no one on this committee and the vast majority of the 435 Members of the House and the vast majority of the American people remember that, and so that is why we can point out problems in the system—and, God knows, it needs help—but let's not just state because somebody comes out of prison worse than they came in that we shouldn't have prisons; that is a non sequitur.

Mr. SONNETT. Mr. Chairman, I am not stating that at all. What I am suggesting to you is that we need to treat different offenders differently. We are never going to go back to any system in which judges have the discretion to let criminals out on the streets.

Mr. SCHUMER. Has your group supported the sentencing guidelines? You took a position originally against it as well.

Mr. SONNETT. We have been working on the criminal justice standards. We have just passed standards, a third edition of standards, relating to sentencing alternatives. We have endorsed a guided discretion system. We have not used the term "guidelines" because that is kind of a hot button.

Mr. SCHUMER. That is my point.

Mr. SONNETT. We have used a system that is very similar but offers some more flexibility.

Mr. SCHUMER. Why haven't you supported these guidelines?

Mr. SONNETT. Because there are aspects of the guidelines that we think need to be changed, but neither do I support the system that you are talking about. Let's understand what we are facing here. We are never going to have again the kind of system you talked about.

Mr. SCHUMER. Well, we have been through the cycle. We had mandatories in the fifties, we went into the theory of rehabilitation and just the theory you are talking about in the sixties and seventies, that prison didn't do the individual good, we went away from it, and we came back to it. So we have been through, in my lifetime, the cycle twice already.

Mr. SONNETT. I was a prosecutor from 1967 through 1972. I lived through the last incarnation of mandatory minimums and applied them, and in those days we had an escape valve; there were statutes that you could charge that didn't carry it. They didn't work then; they don't work now.

The sentencing guideline system, while it is not perfect, provides all of the things that you are talking about and still gives you the discretion, limited and guided discretion, in the hands of judges to be able to deal with some of the problems that you are talking about.

Mr. SCHUMER. I understand.

Judge.

Judge WALKER. I would argue that the guidelines provide a better vehicle for Congress to exercise oversight and influence the process than the mandatory minimums themselves.

Mr. SCHUMER. Thank you.

I would like the opinion of Mr. Sonnett and Mr. Broderick on the question I asked of Judge Wilkins. If it is an escape valve or nothing, which is better, from your point of view?

Mr. SONNETT. Mr. Chairman, I must be honest.

Mr. SCHUMER. You would have to go back to your group.

Mr. SONNETT. No. I could give you an individual answer.

Mr. SCHUMER. OK.

Mr. SONNETT. But even my individual answer would be, unless I knew what the escape valve was, it would be very difficult for me to give you that opinion.

Mr. SCHUMER. I understand.

Mr. SONNETT. I can say to you this though——

Mr. SCHUMER. But I'm just trying to get a general feel. Obviously, I don't even know at this point if we could craft an escape valve and what kind it would be.

Mr. SONNETT. If there were some way crafted—and I'll assume that everybody would be working for the best possible way to do it—so that categories of what you have called egregious cases—I think a broader, perhaps unfair cases, because I have seen Federal judges faced with terrible decisions that may not be egregious but are certainly unfair—and if we could deal with some way to divert those low-level, peripheral, first-time offenders from mandatory minimum sentences into community corrections and other areas where they can be rehabilitated, if that is appropriate for them, then I would say yes, some escape hatch rather than nothing.

The system we have now, I think, is doing more harm than good. It is counterproductive, and I think it needs to be changed. That does not mean—and I want to make it clear—that I favor more lenient sentencing. I simply favor a sentencing system that can deal with the kind of problems and individual offender characteristics that come up or the unusual cases that mandatory minimum sentences cannot and do not take into account.

Mr. SCHUMER. Thank you.

Mr. SONNETT. If you would ask that question of Professor Branham—she has been sitting here patiently while I've been stealing her thunder.

Mr. SCHUMER. Please. The only reason I didn't let you testify: we have a policy that we like to know the witnesses ahead of time, and the first time I knew about it was when you came up here.

Ms. BRANHAM. That's fine.

On the safety valve question, we believe the guidelines provide the safety valve for instances where imposition of a mandatory would lead to unjust results.

Mr. SCHUMER. When I am talking about a safety valve, I am talking about sort of a separate process after——

Ms. BRANHAM. Right, and we are saying why set up a separate, costly, inefficient process when you have got a good one in place?

But I would commend to your consideration, because it looks like you are open on the issue of the safety valve, just to have you look at the safety valve from a different perspective, that you give some thought to enacting a law like that which is in Tennessee. Tennessee has got a law under which, if the State legislature passes a law increasing the length of imprisonment, if it does not include later in a general appropriations act the requisite money to fund that increase, to accommodate that increase, it becomes null and void.

Mr. SCHUMER. That is not a safety valve, that is a different issue.

Ms. BRANHAM. Well, it is a safety valve in this sense. It is ensuring that the system is working effectively. What you are talking about with the safety valve is some instances where enforcement of mandatory minimums will lead to unjust sentences or ineffective sentences, and what I am saying is that if the resources are not allocated you are going to have an ineffective system.

Right now, you have got a system that is overwhelmed, and, to me, it just would be fiscally responsible that if, indeed, these laws are going to be passed, that the funds have to be allocated that would support these changes, and if they are not, then the laws simply must be null and void.

So, again, it is a different perspective——

Mr. SCHUMER. To say the least.

Ms. BRANHAM. I understand that it is not one you are talking about, but, again, we are talking about preserving the efficacy of the system.

Mr. SCHUMER. Let me just tell you my own history with that.

I have been fighting, for the 20 years I have been in government, for more money, and still do to this moment, in the criminal justice system, both on the treatment side and the enforcement side, because I think a lot of politicians give it lipservice and then don't vote the money that is needed to make it happen.

What happened with minimum mandatories was, it was easy to pass the minimum mandatories and the money followed, not in a perfect way and not in a straight line way, but after there were minimum mandatories and the people came back and said, "Well, we're going to need more courts and more prisons and more prosecutors and more defenders to enforce this law," the money followed, whereas when you made the argument in the abstract, "We need more money for the system," it didn't follow.

So I would just posit to you that, in a sense, at least from my observations—and this is not scientific and not factual, quote, as I would say, but just observational—that the minimum mandatories has been a way—admittedly not the best way, but we don't live in a perfect world—of getting the kind of money into the system that we really did need and do need.

Judge.

Judge BRODERICK. Let me respond to your safety valve question. I think it depends on what the safety valve is. I have stated as strongly as I can here and in my written statement our unalterable opposition to mandatory minimums. If there is to be a safety valve, it should be a safety valve of the type that Judge Wilkins was discussing, and my Criminal Law Committee, in fact, has approved that in principle. But it should not be a safety valve that requires a separate proceeding.

One of the real virtues I see of Judge Wilkins' proposal is that it would not require a separate proceeding.

Mr. SCHUMER. Could I ask you, Judge, if you didn't require the separate proceeding, would you be unalterably opposed to letting the prosecutor participate in the decision, mindful of Attorney General Barr's view?

Judge BRODERICK. The prosecutor always participates. If you mean participate in making the decision, no, the prosecutor should not make that decision. Our prosecutors are 28-year-old and 30-

year-old young men and women. They are supremely good and very confident lawyers with no life experience. They don't bring to the sentencing process what, with all modesty, we bring. No. That is a decision that should be made by a judge who has experience, and, I'll tell you, our judges have had a lot of experience and our judges are not soft on crime, and any discussion here about soft on crime being any reason for the position that is being taken by me, being taken by my brother here, is just wrong.

Mr. SCHUMER. I think that is a point well taken.

I have finished with my questions.

Mr. Schiff.

Judge BRODERICK. Mr. Chairman, we may not have convinced the committee, but we have certainly outlasted it.

[Laughter.]

Mr. SCHUMER. Judge, you have outlasted most things in New York City, to your credit and to the city's benefit.

Steve Schiff.

Mr. SCHIFF. A lifetime appointment helps outlast.

Mr. SCHUMER. Right.

We are not advocating term limits for judges, believe us.

Mr. SCHIFF. We are deferential also. We could be practicing in front of you again one of these days.

Turning first to our guest from the Federal judiciary, although there was this ringing endorsement of the sentencing guidelines, or at least ringing acceptance of the sentencing guideline system, I want to emphasize the chairman's question: There has been no resolution adopting it. Officially, your organization is still on record opposing sentencing guidelines, I think for a lot of the same reasons you have given opposition to mandatory minimums. Is that correct?

Judge WALKER. Historically—that is the current state of the record. I have only been in the leadership for a short period of time. Obviously, I am going to take what has been said here right back to the organization, and we are going to work on that, because I think the practicalities of the situation are such that the sentencing guideline regime is with us, and it has got many virtues, and many of the members have spoken to me in favor of it, and I personally think it is working. I am speaking for myself personally.

Mr. SCHIFF. Judge Broderick.

Judge BRODERICK. I have already responded to that. The Judicial Conference never has taken a position in opposition to the Sentencing Commission. When the Judicial Conference meets, Judge Wilkins is generally there, and we have taken very strong positions with the Sentencing Commission with respect to one or another of its guidelines or proposed guidelines, but that is something we are supposed to do, and if you read in my statement a ringing endorsement of the Sentencing Commission, I think that was a fairly accurate reading.

Mr. SCHIFF. I am just pointing out that historically, and I think for understandable reasons, the judiciary has tended, as a body, to object to what they might perceive as interference with their discretion. The point that makes is, it becomes a little difficult then to distinguish opposition to mandatory minimums as, at least gen-

erally, anything other than opposition to anything that might interfere with the discretion.

So if the judiciary is willing as a body—and I am not saying they have to; they don't answer to us on their opinions—then it would be helpful, I think, to the Congress if they were more firmly on record: This is what we at least accept, even if we don't agree with it.

Judge Broderick.

Judge BRODERICK. Mr. Schiff, can we make a deal?

Mr. SCHUMER. I was afraid of this.

Mr. SCHIFF. Make a deal, and then I will listen to anything, Judge.

Judge WALKER. I think that what we have indicated in our statements is that the evils that mandatory minimums were designed to cure the guidelines also cure and that, as between the two, the guidelines offer the kind of flexibility that will resolve the cases that have troubled this committee and troubled the chairman.

The answer really to the dilemma that the committee finds itself in, in dealing with these cases, these particular cases—and, granted, there aren't overwhelming numbers, but there are significant numbers, and I submit that to every prisoner who is sitting in jail who shouldn't be there it is a rather important issue—is that the guidelines can provide the way out, and one should think in terms of working with the guidelines and figuring out how to make them responsive. The guidelines provide an open system, it is above board; the Commission gets the statistics, they get the reports, guidelines sentences are subject to appellate review.

Mr. SCHIFF. Judge Broderick.

Judge BRODERICK. I just want to add that it is my recollection that back in 1983 the Judicial Conference was working with the House of Representatives on a sentencing guideline bill of its own but that ultimately it was the Senate bill that was adopted by Congress.

There was not, I don't think at that time, although I was not on the Judicial Conference—there was not opposition to the concept of sentencing guidelines; I think there may have been a little foot dragging in enthusiastically supporting them.

Mr. SCHIFF. Mr. Sonnett, if I can turn to the ABA now, specifically the Criminal Justice Section, as indicated, I think that section, I guess as adopted by the ABA, opposed sentencing guidelines at first. Is that correct?

Mr. SONNETT. I don't know of any resolution opposing sentencing guidelines. I think the context in which this has arisen is as follows. The Criminal Justice Standards, which is an ongoing work—and we are proud that it is very highly respected nationally—contains a set of standards on sentencing alternatives and conditions. In the revision of that work, the standards adopt a guided discretion system, and the foreword and commentary point out that it is a very different model than the Federal sentencing guidelines.

I suppose you could read that as opposition, although the only vote of the ABA House of Delegates, and therefore the only policy of the ABA, is one in favor of this particular model, and I would commend that model to you. Federal judges who have looked at it have commented to me that they thought it was a brilliant work—

I had nothing to do with it—but a brilliant work by many experts in trying to put together a system of sentencing that was fair.

The other model I would commend to you is one that Professor Branham had an awful lot to do with, and that is the model Adult Community Corrections Act which, in our written testimony, we urge Congress to consider passing, and Professor Branham will testify before another subcommittee tomorrow in greater length on that.

You may want to add something to that.

Mr. SCHIFF. Professor.

Ms. BRANHAM. Again, we are urging that Congress adopt a Federal Comprehensive Community Corrections Act. There are about 20 States that have such acts, and such an act is needed if a community sanctioning program is to operate effectively. We believe very strongly that community punishments can be cost effective, they can adequately protect the public safety, but you need the requisite structure to ensure that they operate effectively, and that would be through a Comprehensive Community Corrections Act. That is why we are commending such an act to you for your consideration.

Mr. SONNETT. One thing that may be worth noting is that the State of Florida just recently abolished most of its mandatory minimum sentences and revamped the sentencing guideline system. One of the major reasons is because in Florida there was a problem with violent criminals being let out of jail early. It was a terrible problem. I think you are quite right, Mr. Chairman, that that is not a problem that we see seriously in the Federal system, but in Florida it was.

Mr. SCHIFF. Let me pursue this a bit further here because I think the time is about at an end. Mr. Sonnett, you would go further with an agenda. I mean there are those individuals who would be voluntarily participating in drug trafficking, at least at some level, that you do not believe should go to prison upon conviction. Is that right?

Mr. SONNETT. In drug trafficking, I'm not sure I would go that far.

Mr. SCHIFF. So if the courier goes to prison, you would support that?

Mr. SONNETT. I think that there are circumstances under which probation or community control, shock probation, boot camp, house arrest, a whole panoply of other alternatives to straight Federal prison incarceration are appropriate.

Mr. SCHIFF. For those convicted of voluntarily trafficking in narcotics?

Mr. SONNETT. If they are low-level, peripheral offenders—you know, the problem with the drug laws today, particularly as broad as the conspiracy laws are, is that the person who sweeps the warehouse can be held just as accountable as the person who makes the money.

Mr. SCHIFF. But you are saying that there are those who may be at the lower end, that they are such at the lower end that, even though they are drug traffickers and participating voluntarily in a system that needs them as drug traffickers, they should be considered for probation?

Mr. SONNETT. They may be charged with drug trafficking. We could have an intellectual debate as to whether they are traffickers.

Mr. SCHIFF. I believe I said convicted.

Mr. SONNETT. But that is my point, Mr. Schiff. The statutes that are employed against people who are involved in any way, no matter how peripherally, in drug offenses, unless it is a simple possession or possession with intent to distribute, and, of course, depending on the amount of cocaine that the Government can prove is involved, the mandatory minimum sentence escalates.

There are people who are charged with conspiracy to possess with intent to distribute cocaine, or some other substance, who may be doing nothing more than being a watchman, a housesitter, sweeping a warehouse, fueling a boat, things like that. Now, do those people know what they are doing? Yes, they doing. Are they then knowingly involved in some way in the drug trade? Yes, they are. Are they then technically involved in trafficking? Yes, they are. Do those people deserve to go to prison for a mandatory 5 or 10 or 15 or 20 years? No.

Mr. SCHIFF. Do they deserve to go to prison, according to you?

Mr. SONNETT. I think that depends on their background.

Mr. SCHIFF. But maybe no.

Mr. SONNETT. Maybe no.

Mr. SCHIFF. That is what I wanted to hear.

Mr. SONNETT. But the difference is, Mr. Schiff—and I can see you were an awfully good prosecutor and defense lawyer because your cross examination has been trying to move me down the road to where I can be accused of being soft on crime or soft on sentencing, and that is not what——

Mr. SCHIFF. Which I think I did, as a matter of fact.

Mr. SONNETT. No. But that is not what I am saying. What I am saying is, there are times in which people who are technically convicted, or charged and convicted of trafficking type offenses—society can be better served, without depreciating the seriousness of the offense, without a lengthy prison term.

Now, should they go to jail for a year perhaps? Maybe. But for 5 years' minimum mandatory, or 10 years' minimum mandatory, because they swept a warehouse where somebody stored enough quantity——

Mr. SCHUMER. Would the gentleman yield?

Mr. SCHIFF. I will, and then I'll conclude.

Mr. SCHUMER. Is that a specific case?

Mr. SONNETT. I have had cases like that, yes, sir.

Mr. SCHUMER. You have had a case where somebody, all they did was sweep a warehouse, first offense, and they got 5 years?

Mr. SONNETT. No, I have never represented a warehouse sweeper, Mr. Chairman, I have represented——

Mr. SCHUMER. Do you know of a case?

Mr. SONNETT. Yes, I do.

Mr. SCHUMER. Of a warehouse sweeper—you have used the example three or four times—of someone who just swept a warehouse, no prior convictions, and got the minimum mandatory. The record will remain open for 5 days for you to submit that case.

Mr. SONNETT. No, I cannot, off the top of my head, tell you about a warehouse sweeper.

Mr. SCHUMER. I yield back.

Mr. SONNETT. And I will provide you with examples, and there are some in the record already.

Mr. SCHUMER. I would just, in all due respect, ask you to use an example where there is a real case.

This is the problem we face with this issue. It is all anecdotal, and then, when you try to find real cases, they vanish.

Judge BRODERICK. Mr. Chairman.

Mr. SCHUMER. Well, it is Mr. Schiff's time, but I would be happy to ask him to yield so somebody could——

Judge WALKER. I can respond. I would like to respond at this point to two cases that were brought to our attention.

Mr. SCHUMER. Please.

Judge WALKER. When we found out we were coming to testify or we were going to make an appearance, either in writing or in person, we asked our members to start sending in cases, and we got one case from the Northern District of Alabama. This is in addition to the two I mentioned. This was a 21-year-old black college student who had no prior criminal record and no prior conviction. He agreed to permit an acquaintance to mail a package containing cocaine to his apartment.

There was no question about guilt or innocence in any of these cases. He knew what was going on, but he didn't know how much was in the package. It turned out that the package contained 370 grams of cocaine base and was intercepted by postal inspectors. He pleaded guilty, attempted to assist the investigators, had no helpful information due to his limited involvement in this scheme, and got his 10 years' mandatory minimum.

Mr. SCHIFF. But this particular case is someone who, by knowingly allowing the package to be mailed to his house, knowing it was drugs, even if he didn't know how much, was voluntarily establishing himself as a link in the drug trafficking system.

Judge WALKER. His guilt is clear. Guilt in all these cases is clear. Indeed, Ms. Richardson's case earlier, her guilt, it seems to me, was clear. At least the jury found her guilty of passing on a telephone number, furthering the conspiracy. There is no question about that. It is a question about whether the 10-year sentence for a first offender, a college student, who makes a mistake, is the appropriate sentence. I am not saying that jail is not appropriate; I think the judge in that case—I don't have it here in front of me—said he would definitely have given that person prison time; there is just no question about it.

Let me mention another case, a similar kind of case. This was a case in which two Mexican aliens were coming across the country and one of them was bringing cocaine. He wanted the second person along because the guy was what is known as a shade tree mechanic—that is, he fixes cars under the shade of a tree—and he wasn't sure his jalopy was going to make it from the west coast to east, so he brought the mechanic along. The mechanic knew what the trip was about—no question about guilt or innocence, no question about furthering the process. Again, 10 years in jail.

Now there is an alien whom a judge reasonably could have given a lesser sentence and deported him. Perhaps that might have been the appropriate thing to do.

Mr. SCHIFF. So he could return the next day?

Judge WALKER. Maybe not. He wouldn't return the next day if he got 3 years.

What is necessary, though? I mean does Congress want to get involved in every case? These are judges are experienced, they look at these situations, this was a first offender, the question was, should he get 10 years when perhaps he had no——

Mr. SCHUMER. Well, Judge, if you would yield——

Judge WALKER. He had no ability to cooperate.

Mr. SCHUMER. Did he have no ability to cooperate? I think that is important to know.

Judge WALKER. The only person he knew in his case was the guy who recruited him to be the mechanic.

Mr. SCHUMER. What was that guy sentenced to?

Judge WALKER. I don't have that actual sentence, but he was also sentenced.

Mr. SCHUMER. All I am saying is—and these are very helpful because, as you know, I think we should try to see if we can craft a narrow escape valve, and this case you mentioned is helpful in that, although in each case—in many of them, when we went back and examined or talked to the prosecutor, there were other circumstances.

To me, what Attorney General Barr said rang very true. Prosecutors don't get their jollies out of taking someone like that and giving them 10 years just for no reason.

Judge WALKER. May I give you one more, Mr. Schumer?

Mr. SCHUMER. Why don't we submit—well, I don't want to submit them to the record, but——

Judge WALKER. If I can just add one more thing on that, rather than projecting the will of Congress out in each case as a mandatory minimum, it seems to me that the will of Congress can be made very plain through the guideline system, and then the judge will make that decision.

Now in this particular case there is no question about the man's guilt, there is absolutely no question if I were the sentencing judge that he would be going to jail, and he would be going to jail for a substantial period of time, but I don't know that I would give him 10 years in an unfettered system.

Mr. SCHUMER. That is a fair comment. All of your comments, Judge Walker—and I think they have been very fair and thought out—lead me inexorably to an escape valve type of thinking, and maybe we can't draft a good one, but that seems to me to get at the problems you are pointing out without creating the problems that have been pointed out by people on the other side, and it befuddles me that that kind of concept isn't getting more kind of positive feed back. Let's see if we could work and see if we could draft something. Maybe we can, maybe we can't.

But what I say to you is, the idea of eliminating mandatory minimums, given all the problems that have been brought up by some of the witnesses, given—you have been here from the beginning and you heard the panoply. On my committee, I suppose there

would probably be two people—this is my guess—who would vote to eliminate minimum mandatories, period, and we probably are a greater percentage than of the whole Congress who would do it. Here I am trying to deal with the kind of problem you are dealing up, and you are basically saying, "Oh, no, we have to go way beyond," and it is not going to happen, and I don't think it should happen, based on the hearing today anyway.

Judge WALKER. We are not involved in the day-to-day political world.

Mr. SCHUMER. It is not just a political world, it is a substantive world too.

Judge WALKER. And a substantive world, but also it is a question of how one relates to the will of the people. That is what politics is all about.

Mr. SCHUMER. Right; that's for sure.

Judge WALKER. In its best sense.

Mr. SCHUMER. Yes.

Judge WALKER. And that is your job.

Mr. SCHUMER. I appreciate that. I am just trying to importune you to the position where you might——

Judge WALKER. I would just like to take this opportunity, in case the hearings end without our having said so, that certainly on behalf of my constituents, we are extremely appreciative of the fact that you are holding these hearings. We think this is an important issue, one that needs to be explored, debated, and openly discussed so that all these problems can be surfaced.

Mr. SCHUMER. Well, I appreciate that, and I have thoroughly enjoyed this hearing, both in terms of learning and in terms of meeting the people and hearing what is going on. So there is no problem with that, and we will continue to try and find something that makes sense and is doable.

Mr. Schiff, I had interrupted you.

Mr. SCHIFF. Mr. Chairman, I appreciate your line of questioning.

Mr. Chairman, I will conclude actually where I came in this morning. I appreciate your holding this hearing. I, for one, feel the Congress should be as willing to look at mandatory sentencing laws as any other law that we pass to see what objections there might be to it.

I have heard enough information, though I am not bowled over by some of the examples given that really anything outrageous happened to certain defendants described, I have heard enough information to know that we should at least take a look at what proposals are there. But I would just respectfully offer a caution that I'm looking up to a certain level because mandatory minimums are such a flat way of approaching these things.

I simply don't think we should go so far as to say that those that traffic in drugs, no matter what else we might say about them in terms of their age and whether they are in college or whatever other factor might be offered, ought to be considered for anything other than a prison sentence, and I know that some of the witnesses here agree with that, I know that some of the witnesses here do not, and I just want to make it clear where I'm coming from in terms of what I'm willing to look at.

Mr. Chairman, a very excellent hearing, and I thank the witnesses and you.

Mr. SCHUMER. I want to thank you, Mr. Schiff. First, I certainly agree with you on that, and I think the majority of us do, that someone who is trafficking should get some kind of jail time, period. But I just wanted to thank you for staying here and adding your erudition, as you do every time.

I also want to thank the witnesses. I think that your being here and us sort of verbally both learning from each other and jousting with one another really helps the process along, and I want to thank all of you for coming. I know how strongly you all feel, particularly Judge Broderick, who has really made this a crusade. We are going to keep talking together to see if we can come up with something.

Judge BRODERICK. Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you. I appreciate it.

Wait just for one minute. Without objection, the hearing record will remain open for the submission of statements from Dewey Stokes, the national president of the Fraternal Order of Police; Prof. David Gottleib from the University of Kansas Law School; and Congressman Rick Santorum of Pennsylvania.

I would certainly like to thank not only my colleagues, but I would have the whole audience note, this was one of those rare hearings where every member of the subcommittee, with a single exception—and I know he was busy on the Intelligence Committee all day—showed up at least for part of this hearing. That doesn't happen very often.

I want to thank my staff: Andy Fois and particularly Dan Cunningham who worked so hard on this hearing; Aliza Rieger, Rachel Jacobson was here and left; and, finally, Lyle Nirenberg, the minority counsel; as well as our gentleman here who sits here diligently for the 5 hours while we are all gabbing and takes it all down and makes it into something that looks pretty good, James Sumiel, who is the recorder for today.

With that, the hearing is adjourned.

[Whereupon, at 3:40 p.m., the subcommittee adjourned.]

APPENDIXES

APPENDIX 1.—STATEMENT OF DAVID J. GOTTLIEB, PROFESSOR, UNIVERSITY OF KANSAS SCHOOL OF LAW

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to appear before you today to discuss the impact of mandatory minimum sentences on the federal criminal justice system. Although a family emergency will prevent my appearance in person, I appreciate the opportunity to submit this written statement.

I am here wearing two hats. I am a Professor at the University of Kansas School of Law who researches and teaches about the criminal justice system. In addition, I am the Director of the Kansas Defender Project, a law school clinic in which students represent inmates at the United States Penitentiary in Leavenworth, Kansas. The Project, begun in 1965, has had the longest continuing relationship with the Bureau of Prisons of any legal services program. I have been its director since 1979. I come here, therefore, as someone who has both studied and practiced in the criminal justice system.

I wish to add my voice to the witnesses today who have criticized the current regime of federal mandatory minimum sentence. These statutes were passed for the most understandable of reasons: our desire to curb the excesses of violent and drug crime in our society. However, the experience of most professionals who administer the system—judges, defense attorneys and prosecutors—is that few if any benefits are produced by these sentences, and that terrible costs are imposed. These anecdotal comments, many of which you have no doubt heard, are borne out by a number of empirical studies that have been conducted on the effect of mandatory minimum sentences. These studies show not only that mandatory minimum terms produce inequity in individual cases, but that, as a whole, they actually undermine some of the goals that the sentences seek to achieve. Our current mandatory minimum sentences do not produce certainty—they produce greater disparity than would exist in their absence. They are applied unevenly, with more culpable defendants often escaping their impact and with the poor and minority defendants left to bear their brunt.

They are producing a defendant population even more cynical about the process that produced their incarceration than defendants sentenced under the discarded indeterminate sentencing system. It is also a population that is essentially without hope—the length and determinacy of current sentences provide few incentives for individuals to attempt to alter their behavior. When added to the severe overcrowding and the strain on resources imposed on the Bureau of Prisons, the result is one of the most volatile situations in my memory.

I.

In the Sentencing Reform Act of 1984, a broad bipartisan majority of Congress sought to chart a new path in sentencing. A determination was made to reject the old indeterminate sentencing system for a guideline system. If there was any single justification cited for the new system it was the need to produce equity. Congress wished to reduce the unjustified disparities caused by unguided judicial discretion. Such disparities were attacked as irrational, as well as fostering the possibility of racially disparate treatment.

Several recent studies of mandatory minimums demonstrate, with a good deal of consistency, that these sentencing statutes are producing some of the very problems Congress sought to eliminate.[1]

The drug and firearm mandatory minimum sentences were obviously passed with the desire to increase uniformity and severity of sentences for individuals found guilty of those crimes. However, the mandatory minimums exact a serious price. Because they are dependent on only one factor (the use of a gun or the presence of a certain quantity of drugs) they are terribly rigid in their application, and they are often applied to individuals far less culpable than those contemplated by Congress when the statute was passed.

The most frequently quoted example is the routine application of drug mandatory minima to couriers. These often destitute and uneducated individuals may gain little from their criminal involvement. Because of aiding and abetting law, however, they may be held responsible for participating in huge narcotics transactions and be held to extremely long sentences.

In addition to their severity, the mandatory minimums, if applied in every case where they could be, would increase dramatically the number of criminal trials.

The data show that because of these difficulties, mandatory minimums are often not applied. Rather, they are used by prosecutors as bargaining chips to induce guilty pleas, or avoided entirely by decisions to charge individuals with penalties not included within the mandatory minimum laws.

The decision whether to charge the mandatory crimes may vary from prosecutor to prosecutor and from district to district. What is clear from the published studies, however, is that there is disparity in the charging practices of different jurisdictions.

Were the disparity in use of mandatory minimum sentences only a question of geography, the situation might not be so troubling. However, the studies show other alarming trends. Apparently, prosecutors have chosen to ask for mandatory minimums in a racially disparate fashion. African-Americans are more likely to be charged under a mandatory minimum than a similarly situated White defendant. This should be particularly troubling since the mandatory minimum laws themselves, even if administered in a totally evenhanded way, would have a disparate impact on minority defendants. The decision to set a mandatory minimum penalty for 5 grams of crack cocaine, but at 500 grams for flake cocaine, creates a class of poor and minority defendants (who are more likely to use crack) subject to mandatory minimum penalties and a class of more affluent abusers of flake cocaine not subject to the minimums.

In addition, the Government's ability to reward defendants for cooperation by the incentive of permitting a sentence below the mandatory minimum also creates disparity and some injustice. Very often, it is the most culpable defendants in multimember conspiracies who have the most assistance to offer. A less culpable, and usually poorer, defendant, may have less information to offer the Government and may therefore not receive an offer for a substantial assistance motion in return for cooperation. Thus, the existence of mandatory minimum penalties may help foster a system that in many cases punishes the poorer and less culpable defendant more severely than the ringleader.

II.

The problems that I have just described are fairly clearly cataloged in the studies I have cited. I would now like to add my views about two problems caused by the new regime of determinate sentencing that I have gained from my personal experience.

First, to an even greater extent than existed during the regime of indeterminate sentencing, our clients regard mandatory minimum sentences as bewildering and unjust, as devices which the wealthy and well-connected can escape, and as traps for the minority and poor. This may be a small, even insignificant, concern to some members of the Committee. However, I would submit that if we are to hope that individuals who prey on society will ever change their behavior, that change must start with a recognition by the individual that the punishment imposed is a just punishment. Under the indeterminate sentencing system, there was often a perception that the penalties depended on the view of the judge before whom the individual was sentenced, but at the very least, the defendant was aware that the judge

[1] These studies include, B. Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms* (Federal Judicial Center) (1992); United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991); *Report of the Federal Courts Study Committee* (1990). See also G. Lowenthal, *Mandatory Sentencing Laws: Undermining The Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61 (1993).

who sentenced him believed that the punishment meted out was just. Moreover, the individual was given the opportunity to change and receive some reward for that change during sentencing.

Under our current system, in contrast, a mandatory minimum may be imposed by a judge who does not believe in the sentence imposed. Indeed, *very often judges will tell defendants they would not sentence them so severely if they had the choice.* A prisoner now knows not only that someone who has committed similar conduct has received a lesser sentence because of an agreement with the prosecutor, he is aware that even the judge may regard his sentence as unfair. The new determinate sentencing regime, designed to promote justice and fairness has, in my experience, produced a more cynical attitude toward the system than even the previous sentencing system.

When this cynicism is coupled with the length and fixed nature of the sentences, the result is a volatile prison population. Our clients sentenced under guideline and mandatory minimum sentences have extremely long terms that simply cannot be reduced. Congress has eliminated parole and reduced good time to a fraction of its former value. The prison has fewer means than it has ever had to secure cooperation from its inmate population.

Not only is the Bureau of Prisons being asked to control a more alienated population, it is being asked to control a greater number of inmates. Guideline and mandatory minimum sentences have resulted in a tremendous increase in prison population.

These factors have produced a high level of tension, I believe, within certain parts of the federal prison system. There have been as many serious incidents in the past year at Leavenworth as there were in the preceding decade. If Congress wishes to continue mandatory minimum sentences, it must devote even more resources to building and staffing prisons than it presently devotes.

Thank you for letting me submit these brief comments. I hope they aid the Committee in its very important work.

APPENDIX 2.—STATEMENT OF MITCHELL S. ROSENTHAL, M.D., PRESIDENT, PHOENIX HOUSE

Mr. Chairman, my name is Mitchell S. Rosenthal. I am a psychiatrist and president of Phoenix House, which is the nation's largest, private, nonprofit drug abuse services agency.

Phoenix House has treated close to 60 thousand men, women and adolescents since we opened in 1967. Today, we operate 15 treatment centers in New York, New Jersey, and California. We work in prisons and homeless shelters and care for a treatment population of more than 2,000, the great majority of whom are in long-term, residential, therapeutic community programs.

I am grateful for the opportunity to add this statement to the record of the Subcommittee's hearings on mandatory minimum sentencing.

In re-examining mandatory sentences for drug offenses, I would ask the committee to take a broad view and consider their impact—not only on our courts and prisons—but also on our streets and communities. The overriding question, I believe, is whether mandatory minimums enhance or diminish the capacity of the criminal justice system to control drug abuse and to reduce the crime, violence, and other manifestations of social disorder that derive from drug abuse.

BENEFITS OF INCARCERATION

Mandatory sentencing presumes a value to incarceration, and this value is generally assessed by two measures. First, there is the gain to society of taking criminals off the streets and denying them—while they are imprisoned—the opportunity to commit additional crimes. Second is deterrence, the benefits that result from discouraging future criminality.

There is no question that society is the winner when certain drug law offenders are taken out of circulation for prolonged periods of time. The cost of their criminal activity would amount to substantially more than the cost of their incarceration.

There is also a reduction in violence. And we should bear in mind that inmates imprisoned for drug offenses characterized as "non-violent" are not necessarily non-violent individuals. They are far more likely to be "disordered" drug abusers, who are characteristically given to behavior that is irresponsible and antisocial, often violent, frequently criminal, and manifesting an almost absolute disregard for the welfare of others.

We cannot, however, justify prolonged imprisonment of all drug law offenders on this basis. Although research on street addicts shows them responsible for enormous amounts of crime—both drug-related and not—it is hard to say how many drug law offenders generate criminal costs to society that equal or exceed the cost of their incarceration.

While the value of incarceration as an "alternative activity" may be difficult to determine, the impact on future criminality is relatively easy to assess. Recidivism is the gauge, and recidivism rates show that correctional dollars buy relatively little deterrence. And there is no evidence that mandatory minimum sentences increase this return.

REDISCOVERING REHABILITATION

There is, however, an exception to the nondeterrence of incarceration. And it defies the findings of research during the early Seventies that discredited the notion of rehabilitation.

There exists today strong evidence that appropriate drug abuse treatment will reduce recidivism. And it will reduce recidivism among all drug abusers in the prison population, most of whom are doing time for non-drug offenses.

The Stay'N Out Program in New York State was the first prison program to demonstrate the ability of drug treatment to reduce recidivism rates. Program participants proved half again as successful remaining out of prison as did comparable nonparticipants from the state system.

The early findings of Stay'N Out are supported by more recent research, including the four-program 1989 study of Marcia Chaiken and Douglas Anglin's 1990 review of 80 programs. In Alabama, correction officials credit treatment programs with reducing work release failures by 50 percent.

Not *all* forms of drug abuse treatment will work. It is *disordered* drug abusers who are largely responsible for crime and violence and most likely to end up in prison. Appropriate treatment for these men and women goes well beyond arresting compulsive drug use. It must address the psychological basis of addiction, alter self-perception, and change attitudes and values that prompt and sustain not only drug

abuse but all self-destructive and antisocial behavior. It needs also to remedy the deficits—social, educational, and vocational—that preclude a positive and productive post-treatment life.

The treatment of choice for most disordered drug abusers—and the regimen that has proven most effective in the correctional setting—is the therapeutic community model of long-term residential treatment. The highly-structured therapeutic community provides heavy-duty support and control, employs self help principles and group process to foster self-discovery and emotional growth, and offers a broad array of rehabilitative and empowering services.

Therapeutic community treatment not only improves correctional outcome but it also improves the correctional process. Inmates in therapeutic community units within the New York State correctional system have been found to be more orderly, to be involved in fewer incidents, and to require less medical attention.

Treatment Alternatives

Effective therapeutic community treatment while in prison adds from $2,500 to $5,000 to the $25,000-a-year cost of incarceration. That's a five to ten percent cost increase for a 50 percent reduction in recidivism.

Greater economy can be achieved by early release to residential treatment in community facilities for inmates who have successfully completed an initial treatment phase in prison. Continuing treatment outside prison is less costly and also makes possible a therapeutically guided return to society.

Therapeutic community treatment as an *alternative* to incarceration is another option that offers an appropriate disposition for many criminal offenders at substantially lower cost than incarceration.

These options should be available to the courts and to correction authorities. It is my belief that the subcommittee can best help resolve the question of appropriate sanctions for drug law offenders by increasing judicial flexibility and encouraging the use of treatment options, including mandated treatment both in prison and as an alternative to prison.

In terms of benefits to society, mandated treatment provides a far more satisfactory alternative than mandated prison time. It responds to the overriding need society now has to control drug abuse and reduce the crime, violence, and other manifestations of social disorder that derive from drug abuse.

I should note here that one great virtue of therapeutic community treatment is that it *can* be mandated. Although resistance to treatment is a fundamental aspect of drug abuse, therapeutic communities have proven uniquely capable of overcoming denial and motivating even residents who are initially reluctant to take part in the process. The research shows conclusively that drug abusers who enter treatment involuntarily are just as likely to succeed as those who enter by choice.

I think it is important for this subcommittee, and for state and federal criminal justice officials, to recognize the capabilities of drug abuse treatment and its pivotal role today. It is a major part of the solution not only to crime and violence but to all the other seemingly intractable social problems that derive, in whole or part, from drug abuse.

Crowded courtrooms and prisons are but the tip of this iceberg. The drug-disordered fill homeless shelters, and welfare rolls. Their children have created a crisis in neonatal intensive care and overwhelmed the foster care system. They run up enormous health care bills for ailments directly related to their substance abuse. And they are responsible for the megaproblems that confound our health care system—the continued spread of AIDS, the emergence of new, drug-resistant strains of TB, and the rising incidence of all sexually transmitted diseases.

The need to reach and treat the most troubled and troublesome of drug abusers is, to my mind, the single greatest priority of our society. So, when we consider all that our courts and prisons cannot accomplish, it seems unreasonable not to exploit fully the criminal justice system's extraordinary capacity to bring disordered drug abusers into treatment and to keep them there.

Thank you.

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